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ABSTRACT

This book is limited to a study of the education opinions of the Supreme Court during the time that Warren Earl Burger served as Chief Justice. Over 100 opinions having direct bearing on education were issued during the Burger years, a total greater than in the entire Court's history. The first chapter presents the history of the establishment of the Court followed by information about the present work schedule, hearing and deliberating on a case, judicial review, and brief sketches of the 13 justices, including Chief Justice Burger. Subsequent chapters discuss the following topics: (1) employment issues in schools; (2) student issues; (3) race and desegregation; (4) school finance issues; (5) civil rights tort; and (6) legacy of the Burger Court and the schools. As the Court's membership changed and the volume of education cases increased, the Burger Court moved from an activist, social change-oriented Court, through a period when the Court assumed a quasi-centrist posture, to a more conservative attitude. The Court's gradual evolution eventually returned more authority to school boards and administrators--authority that had been severely curtailed during the Warren Court era. Legal references accompany each chapter and a table of cases in alphabetical order concludes the book. (MLF)

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THE LEGACY OF THE BURGER COURT AND THE SCHOOLS 1969-1986

Richard S. Vacca and
H.C. Hudgins, Jr.

NOLPE

No. 41 in the NOLPE Monograph/Book Series

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Over his career, he has received the Lindback Award for Excellence in Teaching, the Benjamin Rosner Award for Excellence in Teaching, a Faculty Service Award, and NOLPE's Golden Membership Award.

PREFACE

When Warren E. Burger assumed the position of Chief Justice of the United States, some experts predicted an immediate and abrupt change in the Supreme Court's philosophical direction, from the activist and more liberal path taken by the Warren Court to a more conservative and "hands-off" attitude. As Anthony Lewis observed, "many expected to see the more striking constitutional doctrines of the Warren years rolled back or even abandoned." However, after observing the Burger years, he concluded that the predicted "counter revolution" never came.[1]

To Robert Shayerson, the Burger years can be divided into three distinct periods or phases of gradual development, each one corresponding to the terms of four presidents. According to Shayerson there was the Nixon presidency (1969-74), when "the Court began to narrow some Warren era rulings, yet no landmark was overturned"; the Ford and Carter years (1974-80), during which "the Court resisted type-casting"; and the first Reagan administration (beginning in 1981), "when the Burger Court soon with the first woman justice, Sandra Day O'Connor, increasingly applied procedural brakes that diverted more litigants to state courts or to the political process."[2]

In our view, a sudden and abrupt change in direction in matters of education law was not possible, and the Burger Court gradually developed its own judicial personality. There are three basic reasons for this. First, the decisions of the Warren Court set strong constitutional standards in place. In such benchmark education-related cases as *Brown v. Board of Education* (1954),[3] *Engel v. Vitale* (1962),[4] *Abington School District v. Schempp* (1963),[5] *In re Gault* (1967),[6] and *Tinker v. Des Moines Independent Community School District* (1969),[7] the Supreme Court under Earl Warren left a legacy which the Burger Court could neither treat lightly nor ignore. Second, the Burger Court, in its early years, had among its members seven strong Warren Court holdovers. Associate Justices Hugo Black, John Harlan, William O. Douglas, William Brennan, Byron White, Thurgood Marshall, and Potter Stewart were a part of the Warren Court years and would continue to play key roles in the early Burger Court deliberations. Third, a flood of new civil rights legislation from Congress which began in the Warren years and continued during the Burger years placed serious constraints on the Court. New federal statutes such as: the Equal Pay Act of 1963; the Civil Rights Act of 1964; the Voting Rights Acts of 1965; the Age Discrimination in Employment Act of 1967; the Fair Housing Act of 1968; the Equal Employment Opportunity Act of 1972; the Education Amendments of 1972; the Rehabilitation Act of 1973; the Education of All Handicapped Children Act of 1975; and the Pregnancy Discrimination Act of 1978, produced a federal civil rights context within which the Burger Court decisions had to be placed and the Court's rationale judged for consistency.

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[1] A. Lewis, *Foreword* to the BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T, at vii (V. Blasi, 1983). Retired Associate Justice Lewis F. Powell, Jr., commented in remarks to the American Bar Association Litigation Section meeting, August 12, 1986: "Perhaps to the disappointment of Presidents who nominated members of the Burger Court, there has been no 'counterrevolution' by that Court. None of the landmark decisions of the Warren Court was overruled, and some were extended." The Burger Court, 44 Wash. & Lee L. Rev. 9 (1987).

[2] R. Shayerson, THE ILLUSTRATED HISTORY OF THE SUPREME COURT OF THE UNITED STATES at 245 (1986). As Justice Powell observed, "President Nixon, sensing public displeasure with Warren Court decisions on criminal procedure, announced his intention to appoint conservatives. This also was a goal of Presidents Ford and Reagan. These three Republican Presidents appointed six members of the Court over which Warren Burger presided. But it is clear from the history of the Court, and certainly that of both the Warren and Burger Courts, that Presidents frequently are disappointed in the performance of their appointees." Powell, *supra* note 1.

[3] 347 U.S. 483 (1954).

[4] 370 U.S. 421 (1962).

[5] 374 U.S. 203 (1963).

[6] 387 U.S. 1 (1967).

[7] 393 U.S. 503 (1969).

The chapters of this book illustrate, however, that a gradual change in direction on matters of public education took place over the seventeen Burger years. As the Court's membership changed and the volume of education cases increased, the Supreme Court under Warren Burger moved from an activist, social change-oriented Court, through a period when the Court assumed a quasi-centrist posture, to a more conservative attitude. The Court's gradual evolution eventually returned more authority to school boards and administrators — authority that had been severely curtailed during the Warren Court era.

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CHAPTER ONE
INTRODUCING THE SUPREME COURT

1.0 Introduction

It is almost ten o'clock in the morning, and an awe-inspiring ritual is about to take place. The justices of the Supreme Court of the United States are ready to take their seats and another session of the Court will begin.

The pomp surrounding this ritual is minimal, but it is the history, tradition, and mystique that contribute to the excitement and hushed reverence of the hour. Lesser known than the other two branches of government, the judiciary as embodied in the Supreme Court has a profound impact on the lives of all Americans, for its decisions over the years have involved issues affecting citizens every day.

It is now ten o'clock and the Court's marshall bangs a gavel and intones, "The Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States." That statement brings spectators to their feet, and the nine justices suddenly appear from behind massive burgundy draperies and take their seats. The marshall continues, "Oyez! Oyez! Oyez! All persons having business before The Honorable, The Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court."

This ritual has consumed less than a minute, but what is about to transpire is not lost on those in attendance. For the next two hours the justices may do two things. They may hand down an opinion that has far-reaching consequences for millions of citizens. Second, they may hear arguments involving two cases that were previously accepted for review and from which opinions will be issued several months later.[1]

1.1 Creation of the Court

When the federal Constitution was written in 1787, its drafters devoted article III to the judiciary. That article provided for "one supreme Court" and for "such inferior Courts as the Congress may from time to time ordain and establish." Acting on that provision, Congress established, through the Judiciary Act of 1789, a Supreme Court and a layer of trial courts, now known as federal district courts. It was not until 1891 that Congress created the courts of appeal, a tier of courts between the district courts and the Supreme Court. In addition to those three levels of courts, there are specialized federal courts such as the Court of Military Appeals and the Tax Court. These three tiers of federal courts plus the specialized courts comprise the federal court system.[2]

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[1] A third possible activity may transpire. At the opening of a Court session, attorneys may be admitted to the Supreme Court Bar. Admission to this bar is required if one expects later to argue a case before the Court. Membership to the Supreme Court Bar is by sponsorship of an existing member.

Article III also specifies Supreme Court jurisdiction, which takes two forms. There is, first, original jurisdiction, which the Constitution specifies as including "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." The Court usually hears no more than three or four cases annually which involve original jurisdiction, and these cases typically involve disputes between states over water or boundary rights. The second kind of jurisdiction which the Court has is appellate jurisdiction "both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Under this type of jurisdiction, the Court hears appeals of cases that have already been ruled upon by lower federal courts or the highest court in a state.

Congress gave the Supreme Court more discretion in the kinds of cases it considers through the Judiciary Act of 1925. Under the terms of this Act, cases involving nonoriginal jurisdiction were divided into two categories. One category included review in certiorari, meaning that the appellant has no automatic right to have his case heard; rather, the justices will decide if they will review the case. Most of the cases the Court hears follow this route. The second category involves an appeal of right, meaning that the Court must review the case. These mandatory appeals involve either a federal court ruling which declared a federal law unconstitutional, or a state court ruling which upheld a state law against a federal court challenge. The Supreme Court's mandatory appeal jurisdiction was substantially limited on June 27, 1988, when President Reagan signed P. L. 100-352. Effective September 25, 1988, certiorari became the major path to review by the Supreme Court, from both the state and federal courts below. Some experts predict that this statute will eliminate twenty or more of the 150 cases that usually are decided by the Court each term.

1.2 Work Schedule

The Supreme Court's term officially begins on the first Monday in October and typically lasts until the end of June, or until the justices have handed down all opinions on cases which they have heard. Some suggest that the Court's term actually begins on July 1, for appeals filed on this date or later are considered by the justices in the forthcoming session which begins in October. In other words, the Court is in recess during the summer months of July, August, and September, but petitions for review may be filed during that time.

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[2] The courts of appeal now number thirteen. The District of Columbia has its own circuit, and the specialized courts are viewed as being the thirteenth circuit. In 1980, the fifth circuit was split, with Florida, Alabama, and Georgia constituting a new circuit, the eleventh.

The work of the justices is that of reacting — reacting to petitions before them. The justices do not decide what cases to hear; rather they decide what cases to hear from among those appealed to them. The number of appeals has escalated remarkably over the years. Approximately five thousand petitions for review are filed each year. That number represents from eighty to one hundred petitions each week. Of the total number filed annually, the justices select approximately 150 for review and opinion, a number that has not changed for some years.

Deciding which cases to accept for review involves the justices' collective judgment. Criteria are not explicitly stated but may include the following questions: Is a fundamental constitutional question involved? Is the legality of a federal statute in question? Is a broad public policy question at issue? Is there disagreement among the lower courts on the question?

Four justices must agree to review a case for the full Court to hear the appeal.[3] Action on these appeals transpires in the Court's conference. Preparation for the conference is made primarily by the Chief Justice who prepares a "discuss list," a list of appeals which the justices will review to decide whether to grant or deny certiorari. In this conference the Chief Justice leads the discussion and it proceeds in order of seniority, concluding with the most junior justice. An associate justice may also put a case on the discuss list, in which case that justice begins the discussion. The appeals that never get to the "discuss list" are "dead ended," meaning that they get no further with the Court.

The work schedule of the Court follows two-week intervals. The justices alternate two weeks of open sessions with two weeks of recesses. Open sessions of the Court are devoted to hearing cases that have been accepted for review. The Court sits in open session for two weeks of each month from October through April. During these open sessions the justices hear appeals on Monday, Tuesday, and Wednesday. They hear four appeals per day, allotting one hour per case, except for rare exceptions in which more time may be given to a case.[4]

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[3] Agreeing to hear or not to hear an appeal should not be interpreted as revealing the thinking of the justices or how the justices will rule in a case.

[4] These open sessions are the only firsthand opportunities for citizens to observe the Court in operation. The Court's other work is closed to the public.

Prior to oral arguments, the justices become familiar with a case in several ways. Their first exposure will be in reviewing the case at the time of its initial appeal to the Court. After accepting the appeal, the justices will read the briefs and the lower court opinion, and most likely interact with their law clerks. Law clerks summarize the cases and the issues before the Court.[5]

The Court specifies how attorneys are to prepare briefs. Each brief must be limited to no more than fifty pages, and it must meet specifications regarding print and size of paper. These briefs must be submitted to the Court no later than thirty days before the Court hears the case. Attorneys have some flexibility with respect to the content of the briefs; however, they must prepare indexes which list each case or other authority cited in the text. The briefs have bindings which are color-coded, a practice that provides for easier reference by the justices.

1.3 Hearing a Case

Shortly after the justices have taken their seats at ten o'clock, the Court is ready to hear the first of two cases scheduled for the morning. In a typical week the Court will hear four cases per day, Monday through Wednesday, or a total of twelve per week. Thus, during each two-week period per month, it will hear twenty-four cases, or a maximum of 168 over the months of October through April.

Each side is allotted thirty minutes to present its arguments. The attorney representing the appellant (party appealing the lower court ruling) begins, followed by the appellee's attorney. At any time during their presentations, the attorneys may be interrupted by the justices, in which case no time is added to the initial thirty minutes. The interruptions may be for any number of reasons such as asking for clarification of a point of law, relationship of this case to a previous one, or the attorney's opinion on a hypothetical question. Attorneys must be prepared to deal with these questions and respond with lucid answers while at the same time deciding what to eliminate from their presentations. In short, exhaustive preparation must precede this thirty-minute presentation.

1.4 Deliberating on a Case

On late Wednesday afternoon the justices confer on cases argued on Monday, and on Friday they confer on cases argued on Tuesday and

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[5] Law clerks are recent graduates of the country's finest law schools and represent their best students. Justices may have up to four law clerks each. Appointment as a clerk is considered to be very prestigious, and many clerks have left their positions for choice assignments.

Wednesday. These meetings are held in the conference room dominated by a portrait of former Chief Justice John Marshall. Seating is by seniority. The Chief Justice sits at one end of the rectangular table; the ranking associate justice sits at the opposite end. The next three ranking associate justices sit on one side of the table and the four remaining justices on the other side. Carts containing reference works have already been set out for each justice.

Discussion of the cases proceeds according to seniority. The Chief Justice opens the discussion by reviewing the facts and the decision of the lower court. He then discusses the case and indicates that he would vote either to affirm or overturn the lower court decision. Discussion and voting then proceed according to seniority. Time restrictions are not placed on the justices. Unlike arguments in open court, there are no interruptions of colleagues during the conference; instead, each justice is given the opportunity to state his views free of challenge by peers. Thus, the conference is devoted not so much toward winning over a colleague as it is for exposition of views.[6]

At the conclusion of the discussion of the case, the justices are ready for assignments for the drafting of an opinion. When the Chief Justice votes with the majority, he assigns the author of the opinion. If the Chief Justice is not in the majority, the ranking associate justice makes the assignment. Since the Court hears twenty-four cases per month, a balance among the workload of the justices would be approximately three written opinions per month.

Some of the more significant opinions in the Court's history have been written by the Chief Justice. One reason for this may be that the Chief Justice has an eye toward history and would like to be remembered for having written a landmark opinion. Another reason may be that in a very controversial case, the opinion may be more readily accepted if it is written by the Chief Justice, particularly if it is a unanimous ruling.

The Supreme Court's written opinion is clearly the best and most visible record, not only of the Court but also of the justice who wrote it. In that respect, many people pay very close attention to the exact language used, and they are guided by what the Court says as well as by what it does not say.

In the writing of an opinion, a number of drafts are typically circulated among the justices. This process allows time and opportunity for refinement of the opinion as well as for inclusion of all points of view of justices voting in the majority. It is often necessary for the writer to modify the content of an opinion to satisfy justices who may insist on deletion or addition of a paragraph or change of language. When justices agree with the majority on a decision but do not agree with the reasoning or rationale, they may elect to write concurring opinions. These opinions may be written individually or in concert with others. What these opinions reflect is reasoning that is different from that of the author of the majority opinion.

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[6] The conference is closed to all except the justices themselves. Very little information from the justices or former clerks reveals just what transpires at these meetings.

Justices may also write dissenting opinions. These opinions reflect that the authors voted differently from the justices in the majority. The senior justice in the minority usually assigns the drafting of a dissenting opinion. One or more justices may join in a dissenting opinion, or there could be up to four dissenting opinions.

In the justices' Friday conference, the Chief Justice will determine if any opinions are ready to be handed down. If they are, they will be announced when the Court next convenes in open session. The justice who wrote the opinion will announce it. Contrary to the practice of a number of years ago when the justice would read most of the opinion, the justice will now devote approximately one or two minutes to review the Court's ruling and indicate how the justices voted. Copies of the opinion are immediately available, produced by the Court's own printing press.

1.5 The Justices

This book is limited to a study of the education opinions of the Supreme Court during the time that Warren Earl Burger served as Chief Justice. It covers a period of seventeen years, from 1969-86. That seventeen-year period has a number of interesting characteristics. It is the longest tenure of any Chief Justice during this century and it constitutes a period of remarkable stability for tenure of the justices. Including the Chief Justice, only thirteen justices served during this time. The most outstanding feature of this era is the large number of education decisions handed down, a total greater than in the entire Court's history.[7]

At the time that Burger assumed office, there were seven members on the Court. They were Hugo Black, William O. Douglas, John M. Harlan, Potter Stewart, William J. Brennan, Byron R. White, and Thurgood Marshall. The eighth seat, created by the resignation of Abe Fortas, remained vacant during Burger's first term.

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[7] Over one hundred opinions having direct bearing on education were issued during the Burger years. By contrast, according to Hudgins, the Warren Court handed down only thirty full-scale opinions from 1953-1969.

Harry Blackmun assumed Fortas' seat in 1970. In 1972, Lewis F. Powell and William H. Rehnquist replaced Justices Black and Harlan, each of whom resigned from the Court because of ill health. Justice Douglas resigned, also because of ill heath, in 1975 and was replaced by John Paul Stevens. The last addition to the Burger Court was Sandra Day O'Connor, a replacement for Potter Stewart in 1981.

Who are the justices who comprised the Burger Court? In the order of their accession to the Court, brief sketches of each of the justices follow.

A native of Alabama, Hugo L. Black was born on February 27, 1886. He graduated from the University of Alabama Law School after which he practiced law in Birmingham. He served in the Army during World War I.

In 1926, Black ran successfully for the U.S. Senate from his home state and was reelected in 1932. While a Senator, he worked faithfully for the New Deal programs of President Franklin Roosevelt. Upon the retirement of Justice Van Devanter, President Roosevelt named Black to the Supreme Court in 1937. He served until 1971, one of the longest records of tenure on the Court, when declining health prompted his resignation. Six days later he died.

Black's colleague on the Court, William O. Douglas, was named to the Court in 1939, and, with Black, voted invariably for the rights of individuals during their more than thirty years together on the bench. Born in Maine, Minnesota, in 1898, Douglas spent most of his early life in Yakima, Washington, a state to which he returned often for vacations. He graduated from Whitman College, after which he taught school for two years. He then enrolled in Columbia Law School, graduating with honors. After practicing law in New York for two years and then in Yakima, he taught in the law schools of Columbia and Yale. In 1933, he went to work at the Securities and Exchange Commission, where four years later, he became its chairman. President Franklin Roosevelt named him to the Court in April, 1939 and, at age 40, he became the youngest justice since James Madison appointed Joseph Story in 1811 at age 32.

Douglas' tenure on the Court ran from 1939-75, the longest of any justice in the Court's history. During his tenure seven different Presidents served the country. Douglas' later years on the Court were characterized by very poor health, during which time he was unable to participate fully in the deliberations of the Court.

The third person sitting on the Court when Burger became Chief Justice was John M. Harlan. Harlan was born in Chicago in 1899. In 1955, President Eisenhower named him to the Supreme Court where his grandfather of the same name had served from 1877 to 1911.

Harlan's undergraduate degree was from Princeton and his law degree was from New York Law School. Prior to his service on the Supreme Court, Harlan worked as Assistant Attorney General in New York (1928-30), engaged in private practice (1931-54), and sat on the Court of Appeals for the Second Circuit (1954-55). His tenure on the Supreme Court was from 1955-1971. Because of ill health, he resigned from the Court in September and died shortly before Christmas. Paradoxically, he and Justice Black resigned from the Court within six days of each other and both were dead before the end of the year.

William J. Brennan came directly from the New Jersey Supreme Court to the federal Supreme Court. He had served in the state court system of New Jersey, successively at the trial, intermediate, appellate, and supreme court levels. In 1956 President Eisenhower appointed him, at age 50, as Associate Justice. He put in over thirty years of service with the Court.

Brennan was born in Newark, New Jersey, in 1906. He earned his undergraduate degree from the University of Pennsylvania and his degree in law from Harvard. He practiced law in Newark from 1931-49 except for three years of service with the Army during World War II.

Potter Stewart was the third appointee to the Supreme Court by President Eisenhower. Eisenhower had earlier named him to the Court of Appeals for the Sixth Circuit at age 39, and four years later he was elevated to the Supreme Court under a recess appointment. Eisenhower formally nominated him in January, 1959, and the Senate confirmed him in May. He served twenty-three years on the Court until his retirement in 1981.

A native of Jackson, Michigan, Stewart received both his undergraduate and law degrees from Yale. After service with the Navy in World War II, he practiced law in Cincinnati.

The next justice, Byron R. White, was the first person who served as a justice's law clerk to be named later as a justice of the Court. White had clerked for Chief Justice Fred Vinson. President John F. Kennedy named White, who had been active in Kennedy's campaign for the presidency, as deputy attorney general in 1961 and as an associate justice one year later. Prior to his position as deputy attorney general, White practiced law in Denver from 1947-60.

White was born in Fort Collins, Colorado, in 1917. He graduated from the University of Colorado and Yale Law School. He served in the Navy from 1942-46. His varied background included playing professional football with Pittsburgh and Detroit and being elected to the Pro Football Hall of Fame. He was also a Rhodes Scholar.

Before he became an associate justice, Thurgood Marshall appeared before the Supreme Court on a number of occasions. As chief legal officer of the NAACP from 1938-61, Marshall argued many cases before the Court and established a very enviable record of success. Following that role, he was appointed by President Kennedy to the Court of Appeals for the Second Circuit, and President Johnson named him as Solicitor General in 1965. Two years later, Johnson named him to the Supreme Court. Marshall is the first and, to date, only black to serve as a justice of the Court.

A native of Baltimore, Maryland, Marshall was born in 1908. He is a graduate of Lincoln University and Howard School of Law.

The seven individuals described above comprised the Court at the time that Warren Earl Burger became the nation's fifteenth Chief Justice in 1969. Burger came to the Supreme Court from the Court of Appeals for the Second Circuit where he had served since 1956. Prior to that time, he had engaged in private practice (1931-53) and worked as an assistant attorney general (1953-56).

A native of St. Paul, Minnesota, Burger was born in 1908. He graduated from the University of Minnesota and St. Paul College of Law. Burger became the first of President Nixon's four appointees to the Supreme Court. In becoming Chief Justice, Burger succeeded Earl Warren, who had functioned in that capacity for sixteen years, from 1953-69. When he resigned in 1986, Burger had served a total of seventeen years as Chief Justice, a tenure surpassed only by Marshall (1801-35), Taney (1836-64), and Fuller (1888-1910).

When President Nixon named, and the Senate confirmed, Harry A. Blackmun to the Court in 1970, he became the ninth member, and, for the first time in a year, the Court had a full complement of members. A native of Nashville, Illinois, Blackmun was born in 1908. He received both his undergraduate and law degrees from Harvard. After serving as a law clerk for one year in the Court of Appeals for the Eighth Circuit, Blackmun then opened a practice in Minneapolis. In 1950, he became counsel for the Mayo Clinic. In 1959, President Eisenhower appointed him to the Court of Appeals for the Eighth Circuit where he served until his appointment to the Supreme Court.

Lewis F. Powell, Jr., became President Nixon's third appointee to the Supreme Court. He was the only member of the Burger Court to have been in private practice at the time of his appointment. After receiving an undergraduate degree from Washington and Lee and a law degree from Harvard, the Suffolk, Virginia native spent most of his time in practice in Richmond. He had four years of service with the Air Force during World War II.

While in private practice, Powell became the president of the American Bar Association in 1964. Seven years later President Nixon named him to the Court, and he took his seat in 1972.

Powell was a member of the Richmond City Board of Education prior to service on the Court and author of a number of education opinions as associate justice. Powell's retirement from the Court in 1987 set off a controversy about his successor. The Senate rejected President Reagan's nomination of Robert Bork, and the President's second choice, Douglas A. Ginsberg, requested that his name be withdrawn after disclosure of embarrassing incidents from his past. The President's third nominee, Anthony Kennedy, was easily confirmed and began service in February, 1988.

William H. Rehnquist, a native of Milwaukee, Wisconsin, was born in 1924. He earned three degrees, including a law degree from Stanford and a master's degree from Harvard. He became the second clerk for a Supreme Court Justice to be later named as an associate justice, his experience having been with Justice Jackson. After private practice in Phoenix, he was chosen by President Nixon to be associate attorney general. In 1972, Nixon named him to the Supreme Court on the same day of Justice Powell's appointment. Upon the retirement of Warren Burger in 1986, President Reagan named Rehnquist as Chief Justice.

A native of Chicago, John Paul Stevens was born in 1920. He received his undergraduate degree from the University of Chicago and his law degree from Northwestern. After service in the Navy during World War II, he became a clerk for Justice Wiley Rutledge. Following that experience he was associate counsel for a subcommittee of the House of Representatives and later served on the staff of the attorney general. President Nixon appointed him to the Court of Appeals for the Seventh Circuit in 1970, and five years later, after the resignation of Justice Douglas, President Ford appointed him to the Supreme Court.

When Sandra Day O'Connor was named to the Supreme Court in 1981, she was the first woman to become a justice on the nation's highest bench. She also became the only justice on the Court at that time to have had legislative experience.

O'Connor was born in El Paso, Texas, in 1930. Both her undergraduate and law degrees are from Stanford where, in law school, one of her classmates was William H. Rehnquist. She practiced law in the Phoenix suburbs, and from 1965-69, was assistant attorney general in Arizona. In 1969, she was appointed to the state senate to fill an unexpired term and ran successfully for that post in 1970 and 1972. In 1972, she became senate majority leader. Two years later she became a judge in Maricopa County. In 1977, she was named to the Arizona Court of Appeals, a position she held until her appointment to the Supreme Court.

1.6 Judicial Review

The Court first used the notion of judicial review in 1803 under Chief Justice Marshall when it ruled on the constitutionality of an act of Congress. In assuming that prerogative, the Court decided that it was the final arbiter in questions involving the interpretation of the Constitution as applied to acts of Congress.

Over the years the Court has developed rules in its exercise of judicial review that have an impact on the country. It will not render an advisory opinion; rather, there must be a real controversy for the Court to hear arguments and render an opinion. Second, a party must have actual standing to sue; one must be adversely affected as opposed to simply being an interested bystander to a real controversy. Third, the Court prefers to decide a case on the narrowest possible grounds. Although an issue may be framed very broadly before the justices, that issue may be narrowed considerably when it is resolved. Fourth, the Court prefers to decide issues on non-constitutional grounds. When it is possible to decide an issue on statutory rather than constitutional grounds, the Court may elect to do so.

In exercising judicial review, the Court may rule on the constitutionality of a provision in a state constitution, act of Congress, an act of a state legislature, or the legality of a policy. Its decision may have far-reaching consequences as in the *Brown* decision of 1954, which overturned constitutional provisions and statutes of twenty-one states. A ruling involving the legality of a school board policy may also have far-reaching consequences, for example, the case involving the legality of Bible reading and morning prayers in which the Court ruled that Bible reading and prayer as devotional exercises opening the school day were unconstitutional.

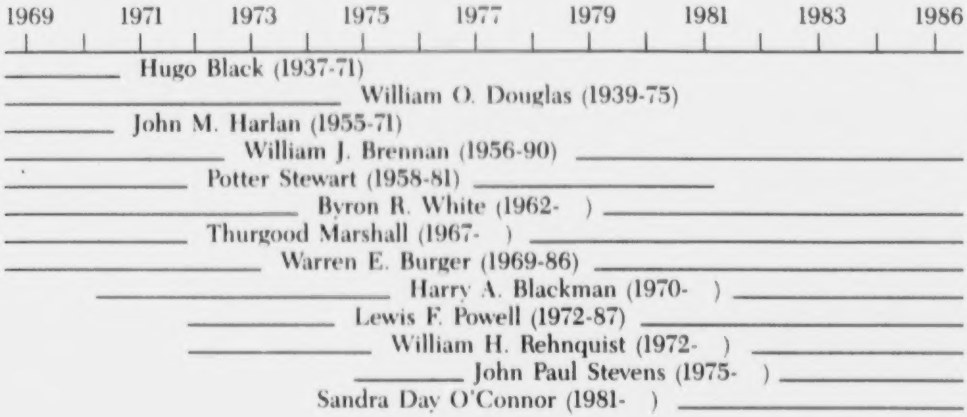
The Supreme Court cannot rule on the legality of a provision of the Constitution. If it were to do so, it would be placing itself above the Constitution.

The Burger Court*

Justice	Years of Service	Appointed by President	Position Prior to Appointment
Hugo Black	1937-72	F. Roosevelt	U.S. Senator, Alabama
William O. Douglas	1939-75	F. Roosevelt	Chairman, Securities & Exchange Commission
John M. Harlan	1955-71	Eisenhower	Court of Appeals, Second Circuit
William J. Brennan	1956-90	Eisenhower	New Jersey Supreme Court
Potter Stewart	1958-81	Eisenhower	Court of Appeals, Sixth Circuit
Byron R. White	1962-	Kennedy	Deputy Attorney General
Thurgood Marshall	1967-	Johnson	Solicitor General
Warren Burger	1969-86	Nixon	Court of Appeals, Second Circuit
Harry Blackmun	1979-	Nixon	Court of Appeals, Eighth Circuit
Lewis Powell	1972-87	Nixon	Private Practice, Richmond, Virginia
William H. Rehnquist	1972-	Nixon	Associate Attorney General
John Paul Stevens	1975-	Ford	Court of Appeals, Seventh Circuit
Sandra Day O'Connor	1981-	Reagan	Arizona Court of Appeals

*The authors are indebted to Gary K. Laney for the preparation of this table.

Tenure of the Burger Court



CHAPTER TWO
The Burger Court On Employment Issues In Schools

2.0 Introduction

As American public education moved through the pre-Warren Court years, local boards of education continued to exercise considerable discretion in making personnel decisions. Supported by both historical pattern and practice and by state statutes, board authority to recruit, screen, hire, assign, transfer, suspend, nonrenew, and dismiss employees remained relatively unchecked, as the Court seemed reluctant to interfere with such decisions.

Beginning with the Warren Court's first major decision in *Brown v. Board of Education* (1954),[1] however, a new era dawned in public school employment. *Brown*, a landmark case in student desegregation, would prove to have unforeseen and long-lasting ramifications for employment, many of which would come to fruition during the Burger years.

The Warren Court, post-*Brown*, had been faced with a faculty desegregation case when, in 1965, it heard *Bradley v. School Board of Richmond*.[2] However, since the Warren Court's immediate priority was to eliminate student segregation in public schools, we did not learn much about employment discrimination in the *Bradley* decision.

When Warren E. Burger assumed his role as Chief Justice, a full-scale civil rights movement was already underway in this nation. Originally led by such organized groups as the National Association for the Advancement of Colored People (NAACP); the Congress on Racial Equality (CORE); the Southern Christian Leadership Conference (SCLC); and the Student Non-Violent Coordinating Committee (SNCC), the first judicial responses taken were meant to remove discriminatory barriers in employment based upon a person's race. However, by 1969, the United States Congress had expanded the scope of antidiscrimination law with such new statutes as the Equal Pay Act (1963),[3] limiting gender discrimination in wages and benefits paid; the Civil Rights Act of 1964,[4] especially title VII, prohibiting employment discrimination based on race, national origin, gender, color, or religion; and the Age Discrimination Act (1967).[5] It was just a matter of time before broader issues of employment discrimination were raised in the public education arena.

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[1] 347 U.S. 483 (1954). *See also* Brown v. Board of Education, 349 U.S. 294 (1955), in which the Warren Court declared that full compliance with the principle of equal educational opportunity must move forward with "all deliberate speed."

[2] 382 U.S. 103 (1965).

[3] 29 U.S.C.A. 206(d).

[4] 42 U.S.C.A. 2000e *et seq.*

As this chapter illustrates, the Burger Court's several decisions concerning employment in schools began with matters of faculty and staff desegregation, moved to situations where gender discrimination was alleged, expanded to issues of national origin, and included attempts to clarify the very complex process of affirmative action. The material presented also demonstrates, among other things, the Court's efforts to protect the procedural and substantive entitlements of school employees, especially in matters where first amendment rights of expression are implicated.

2.1 Faculty and Staff Desegregation

Early in its first term the Burger Court was confronted with allegations of employment discrimination in public school systems. Alleging racial discrimination, plaintiffs had taken local school boards into federal court seeking judicial mandates to eliminate vestiges of the separate but equal doctrine. Actually having their genesis in issues of student racial desegregation, these early education employment cases were followed by a gradually expanding set of discrimination questions.

Beginning in October 1969, in such decisions as *Alexander v. Holmes County Board of Education*,[6] and continuing through the early months of 1970, the Burger Court made it very clear that it would not tolerate any delays in dismantling segregated public school systems.[7] Using the "all deliberate speed" mandate of *Brown II*,[8] a mandate affirmatively applied later in *Griffin*[9] and *Green*,[10] the Court stated specifically that the immediate dismantling of existing racially segregated school systems should include, among other things, provisions for teacher assignments to alleviate past discriminatory practices.

One year after *Alexander*, in *Davis v. Board of School Commissioners (1971)*,[11] the Burger Court specifically disapproved a desegregation plan wherein, among other things, inadequate consideration was given to possible use of bus transportation and split attendance zoning. However, the Court affirmed aspects of the plan dealing with faculty and staff ratios.

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[5] 29 U.S.C.A. 621 *et seq.*

[6] 396 U.S. 19 (1969).

[7] *See, e.g.*, Singleton v. Jackson Mun. Separate School Dist., 90 S. Ct. 608 (1970).

[8] *Brown*, 349 U.S. 294.

[9] Griffin v. County School Bd., 377 U.S. 218 (1964).

[10] Green v. County School Bd., 391 U.S. 430 (1968).

[11] 402 U.S. 33 (1971).

In *Davis*, the Burger Court rejected arguments of local school authorities that the Constitution requires that all teachers be assigned on a "color blind" basis, and held that use of racial preference was a legitimate remedial measure where a segregated situation existed. This decision would cause confusion among public school officials, since they would not know when, or for what reasons, they could permissibly use race as a specific criterion in making an employment decision.

On the same day it handed down *Davis*, the Burger Court decided one of its most significant student desegregation cases, *Swann v. Charlotte-Mecklenburg Board of Education*.[12] In the opinion, Chief Justice Burger reiterated the Court's goal of eliminating from public schools all vestiges of state-imposed segregation. Further, he voiced the Court's acceptance of the notion that the desegregation of faculty and staff was a necessary part of eliminating racially identifiable schools and establishing a unitary school system. In *Swann*, the Burger Court saw it as within the equity power of the district courts to use racial preferences to redress past discriminatory policies and practices in public school systems. *Swann* is treated more fully in Chapter 4.

That same year (1971), the Burger Court handed down its landmark decision in *Griggs v. Duke Power Company*.[13] *Griggs*, a nonschool case involving title VII of the Civil Rights Act of 1964, had the primary effect of forcing employers to remove arbitrary, irrational criteria used for applicant and employee selection. At issue in this case was a requirement that job applicants for certain positions possess either a high school diploma or achieve a passing grade on a standardized test as a precondition of employment. In ruling against the Duke Power Company, the Burger Court commanded that an applicant be measured for the job and not in the abstract. Subsequently, the application of *Griggs* to education matters caused local school boards not only to publish detailed job descriptions, but also to set forth the qualifications necessary to obtain and hold a specific job. Shortly after *Griggs*, the lower courts were called on to examine various means used by school boards to select, promote, and retain personnel. *Griggs* marked the beginning of a new era in public school system employment decision-making.

Six years later, in *Hazelwood School District v. United States*,[14] the principal issue was faculty desegregation and not student desegregation. A U.S. district court in Missouri had ruled that the government failed to establish that the school system engaged in a pattern and practice of racial discrimination in violation of title VII. On appeal the Eighth Circuit reversed, in part, and remanded the case. The Supreme Court granted certiorari.

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[12] 402 U.S. 1 (1971).
[13] 401 U.S. 424 (1971).
[14] 433 U.S. 299 (1977).

With only Justice Stevens in dissent, the Burger Court gave some guidance to school officials when it held that: (1) gross statistical disparities alone, in a proper case, constitute prima facie proof of a pattern and practice of discrimination; (2) a proper comparison in determining a prima facie case of racial discrimination is between the racial composition of a school district's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market, and not upon a comparison of the teacher and student populations; (3) proof that an employer engaged in racial discrimination prior to the effective enforcement date of the Civil Rights Act of 1964, might, in some circumstances, support the inference that such discrimination continued, particularly where relevant aspects of the decision-making process had undergone little change; and (4) even before the amended Civil Rights Act of 1964 became applicable to public employers, public employers were subject to the command of the fourteenth amendment not to engage in purposeful discrimination.

In vacating and remanding to the district court, the Burger Court held that the Eighth Circuit had erred by disregarding the school system's post-Act hiring statistics. Here, the notion of past pattern and practice and the use of post (or past) hiring statistics were singled out as key factors in establishing a purposeful discriminatory intent. This meant that school boards and their administrative officers would need to pay special attention to the historical antecedents of current employment decisions, before making those decisions.

2.2 Gender Discrimination

Prior to the 1960s, employers routinely applied different policies, rules, and standards to male and female employees. As Alexander and Alexander remind us:

> The unequal treatment of employees based on sex was condoned by society for many years. Sex-based discrimination in working conditions, compensation, prerequisites for employment, and work-related benefits came under criticism during the early 1960s and Congress responded by passing legislation to prohibit such discrimination.[15]

The authors then cite, as examples, the passage of the Equal Pay Act of 1963 and title VII of the Civil Rights Act of 1964.

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[15] K. Alexander & M. D. Alexander, AMERICAN PUBLIC SCHOOL LAW at 643 (1985).

Beginning in the mid-1970s, the scope of employment discrimination allegations had expanded and the Burger Court began to hear a variety of employment discrimination cases not related to public school desegregation. Two such cases with significant impact on local school board policy and practice regarding female employees were *Cleveland Board of Education v. LaFleur*[16] and its companion case, *Cohen v. Chesterfield County Board of Education*.[17] *LaFleur* involved two female junior high school teachers employed by the Board of Education of Cleveland, Ohio, and *Cohen* involved a female public school teacher employed in Chesterfield County, Virginia. Both cases were spawned by the application of mandatory leave rules and arbitrary cut-off dates for pregnant teachers. These practices were common in local school systems across the country. Generally, such policies called for the immediate resignation of the pregnant teacher, without pay, several months before the expected birth of the child.

In *LaFleur*, the two teachers were subject to a school board requirement that every pregnant teacher must take maternity leave without pay, beginning five months before the expected birth of her child. And, the pregnant teacher had to apply for such leave no later than two weeks prior to the date of departure. Failure to comply with this rule meant dismissal from employment. Additionally, a teacher on maternity leave must provide a doctor's certificate to return to work but could do so no sooner than the beginning of the next regular semester following the date when the child reached the age of three months. However, the school board did not promise reemployment to that teacher; she was merely given priority in reassignment to a position for which she was qualified.[18]

In *Cohen*, the board's maternity leave policy required a pregnant teacher to leave at least four months prior to the expected birth of her child. And, the board mandated notice from the teacher at least six months prior to the expected birth of her child. To be declared eligible for reemployment, the teacher on leave had to submit written notice from her physician that she was "physically fit" for employment. Also, the employee must give assurance that care for her child will cause "only minimal interference with her job responsibilities...."[19]

In holding that the mandatory termination policies of both Cleveland and Chesterfield violated the due process clause of the fourteenth amendment, Justice Stewart reiterated the Supreme Court's recognition of personal choice in matters of marriage and family life: "While the regulations

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16. 414 U.S. 632 (1974).
17. *Id.*
18. *Id.* at 634.
19. *Id.*

no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster ... because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child."[20] The mandatory maternity leave policies, continued Justice Stewart, placed an arbitrary and irrational burden on a woman's exercise of protected constitutional liberty, more specifically, the freedom of "personal choice in matters of marriage and family life."[21] These two decisions changed the way local boards treated pregnant teachers and opened the way to a whole host of new employment issues involving women.

A few years later, in a continuing effort to forbid discrimination against women, the Burger Court interpreted and extended the applicability of title IX, Education Amendments of 1972, which prohibits federally funded education programs from discriminating on the basis of gender, to matters of employment in public school systems. This decision was unexpected, since title IX's application to school matters had been more in the realm of student activities (including athletics) than in employment.

In *North Haven Board of Education v. Bell*[22] and its companion case, *Trumbull Board of Education v. United States Department of Education*,[23] two public school systems in Connecticut brought separate suits challenging HEW's authority to issue regulations governing the operation of federally funded programs. HEW had interpreted and extended the term "person," as used in title IX, to encompass employees as well as students in federally funded programs. This interpretation, argued HEW, allowed for the application of title IX to employment practices ranging from job classifications to pregnancy leaves.

In *Bell*, the North Haven Board of Education received federal funds for its education programs and activities. During the 1975-76 school year it devoted between 46.8 percent and 66.9 percent of its federal assistance to salaries of employees. In January 1978, a tenured teacher in the North Haven school system filed a complaint with HEW saying that the school board's refusal to rehire her after a one-year maternity leave violated title IX. When HEW attempted to investigate the allegation, North Haven refused to comply on grounds that HEW had no authority to regulate employment practices under title IX.

The *Trumbull* case involved another investigation by HEW. This time, however, a female guidance counselor in another public school system in Connecticut claimed that she had been discriminated against in job assignments, working conditions, and the failure to renew her contract. HEW had notified the Trumbull School System that it was in violation of title IX and that corrective action had to be taken. The Trumbull School System filed suit in federal district court contending that HEW's title IX employment regulations were invalid.

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[20] *Id.* at 643.

[21] *Id.* at 647.

[22] 456 U.S. 512 (1982).

[23] 456 U.S. 517 (1982). The two cases were consolidated on appeal. *See* North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 733 (2d Cir. 1980).

On appeal to the Second Circuit, that court held that title IX encompassed matters of employment discrimination. Subsequently, the cases went to the Burger Court.

In resolving the conflict, Justice Blackmun searched for the original intent by turning to the legislative history of title IX and held that the language of the statute verified the appellate court's conclusion that employment discrimination in federal programs, based on gender, comes within the prohibitions of title IX.[24] In remanding the case for further proceedings Justice Blackmun saw title IX as tailored broadly enough to achieve its remedial purpose regarding gender discrimination in the workplace. This unexpected extension of title IX caused school boards and administrators to revise their employment policies and practices wherever federal dollars were being used in programs. However, the "program specific" dimensions of title IX would be left for a future determination, as well as the question of the permissibility of HEW's termination of a violator's federal funds.[25]

2.3 National Origin Discrimination

During the decade of the 1980s, the Burger Court continued to expand the scope of its rulings on employment discrimination in education. For example, in *Delaware State College v. Ricks (1980)*,[26] a case out of higher education, a black librarian who had been denied academic tenure alleged that Delaware State College had discriminated against him not on the basis of his race, but on the basis of his national origin in violation of both title VII and 42 U.S.C. section 1981. Columbus Ricks' essential allegation was that he had been denied tenure illegally.

One of the most difficult forms of discrimination to substantiate involves a person's national origin. Yet, in remanding the case, the Burger Court acknowledged that an unlawful employment practice existed. Instead of characterizing it as a discriminatory termination of Ricks' employment, however, the High Court considered it a discriminatory denial of tenure.[27] The Burger Court's reasoning in *Ricks* showed a reluctance to become involved in the inner workings of a college's tenure process, absent a clear showing that the tenure decision was erroneous. Despite the fact that *Ricks* is a college case, public school boards and administrators can infer from the opinion that their tenure or continuing contract decisions will likely withstand judicial scrutiny, absent a clear showing of arbitrariness, or an intent to deprive an employee of a protected property or liberty interest.

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[24] *Trumbull*, 456 U.S. 517, 535-36. For a non-school decision showing the application of title VII to matters of sexual harassment as a form of sexual discrimination, *see* Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986).

[25] *Trumbull*, 456 U.S. 517, 540. The Supreme Court did not address whether or not petitioner school-board funds should be terminated, nor did it define the term "program" under the Act. *See also*, Grove City College v. Bell, 456 U.S. 555 (1984), a private college case where the Burger Court made a program specific ruling regarding title IX. The reader will want to see the Civil Rights Restoration Act, 20 U.S.C. 1681 (1988), which among other things restores to full applicability title IX.

[26] 449 U.S. 250 (1980).

2.4 Affirmative Action

As this nation moved through the decade of the 1970s and into the early 1980s, the concept of affirmative action came before the Burger Court in several different forms. The federal courts of appeal had been busy using their broad equitable power to provide remedies to employees who had been victims of past discriminatory practice. Several of these court challenges involved the notion of seniority in the workplace as an alleged perpetuator of past discrimination.

According to Morris, the concept of affirmative action came into being in labor law, and was used to identify programs in which "a person of authority or an institution itself, takes some kind of initiative, either voluntarily or under the compulsion of law, to increase, maintain or rearrange the number or status of certain minority group members within a larger group."[28] Often, suggests Morris, such programs are coupled with goals (involving timetables and specified percentages). And, where these goals are "vigorously pursued," he says, "they can function as, and have been attacked as, ... 'quotas.'"[29] Whichever path the employer takes, a good faith effort is expected to make the overall affirmative action program work wherever an imbalance might exist in jobs traditionally segregated on the basis of race, gender, or some other protected class designation.

Hints of the Burger Court's attitude toward using "goals" or "quotas" as permissible tools of remedy in public school situations, can be seen in such student desegregation decisions as *Swann* (1971).[30] Moreover, the

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[27] *Id.* Justice Stewart dissented, joined by Justices Brennan and Marshall.

[28] Morris, *Affirmative Action and "Quota" Systems*, 28 West's Educ. L. Rptr. 1203 (1986). In his commentary Morris separates *inclusionary* affirmative action programs from *exclusionary* affirmative action programs. *Id.* at 1204-05.

[29] Morris, *supra*, note 28, at 1204. For an excellent example of a non-school decision from the Burger Court extending affirmative action plans to matters of gender discrimination under title VII, *see* Johnson v. Transportation Agency, 107 S.Ct. 1442 (1987).

[30] 402 U.S. 1.

Court's method of dealing with preferential treatment on the basis of a specific classification was contained in its landmark decision out of higher education, *Regents of the University of California v. Bakke* (1978).[31] And, in cases from the private business sector, such as *Franks v. Bowman Transportation* (1976),[32] and *United Steelworkers v. Weber* (1979),[33] the Burger Court undergirded the "make whole" provision of title VII, and the discretion of the federal courts to order such affirmative action. Subsequently, these opinions would be somewhat modified and limited to the specific employment conditions in each case, as the Court decided matters from the public school employment arena.

In 1986, for example, the Burger Court (by a vote of 5-4), approved affirmative action, which, under certain conditions, gave preferential treatment to minorities, when it decided *Wygant v. Jackson Board of Education*.[34] *Wygant* involved a collective bargaining agreement between the local board of education and the teachers' union. At issue was a provision of the agreement specifying that if it became necessary to lay off teachers, those with most seniority would be retained, except that at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. This provision was upheld in litigation and the board adhered to it. Subsequently, nonminority teachers, displaced by the layoff provision, brought suit in federal court.[35]

Dismissing the suit, the federal district court upheld the constitutionality of the layoff provision, saying that racial preferences need not be grounded on a finding of prior discrimination. The Sixth Circuit Court of Appeals affirmed.[36]

In a plurality opinion, the Burger Court struck down the voluntary layoff provision. In the majority's view, the voluntary layoff provision in the collective bargaining agreement violated the equal protection clause, since the agreement was not sufficiently narrow to accomplish its purpose of remedying prior discrimination.[37] Additionally, said Justice Powell for the majority, societal discrimination alone is insufficient to justify a racial classification. In Powell's view, there must be convincing evidence of past discrimination by the governmental unit involved. "Societal discrimination, without more," he said, "is too amorphous a basis for finding race conscious state action...."[38] What is confusing about *Wygant*, however, is that the majority supported the concept of affirmative action. The opinion suggests the acceptability of a local school board adopting "hiring goals" as a less intrusive alternative for imposing a racially classified remedy to overcome past discrimination.

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[31] 438 U.S. 265 (1978). A sharply divided Court in this case ruled that race was the key reason by which Bakke, a white male, had been rejected from admission to medical school, thus the preferential admissions program (where 16 of 100 first-year slots were designated for minority students) operated on unconstitutional grounds.

[32] 424 U.S. 747 (1976).

[33] 433 U.S. 193 (1979). It must be kept in mind that *Weber* is a private sector case, and the Burger Court in *Weber* does not show us a clear difference between permissible and impermissible action program. *Weber* does express an attitude in which the Court places a priority on encouraging the formulation of voluntary remedial plans.

[34] 476 U.S. 267 (1986). In *Wygant*, Justice Marshall wrote a dissenting opinion, joined by Justices Brennan and Blackmun. Justice Stevens wrote a separate dissent.

[35] *Id.* at 271.

[36] *Id.* at 273. *See* 746 F.2d 1152 (6th Cir. 1984).

The *Wygant* opinion's emphasis on past pattern and practice and the use of hiring goals gives some guidance to school board members and administrators faced with the potential of such litigation. However, the majority in *Wygant* made it clear to school officials that efforts to provide "role models" for minority students will not be an acceptable sole justification for launching future affirmative action programs.[39]

2.5 (a) Teacher Rights: Procedural Due Process

During its 1972 term, the Burger Court took a major step to expand and extend the scope of constitutional protections regarding procedural due process to all employees, both tenured and nontenured. In *Board of Regents v. Roth*[40] and *Perry v. Sindermann*,[41] decisions which some legal scholars say launched the "era of teacher rights," the Court struck a balance between local school board employment prerogatives granted by state code, and teacher entitlements under the federal Constitution's fourteenth amendment. These two decisions proved to have profound ramifications for public school system employment practices.

Roth, a case out of higher education, involved a nontenured assistant professor at Wisconsin State University-Oshkosh, who had been hired for one academic year. After being notified that he would not be rehired for another academic year (which was the sole requirement for nonrenewal under the rules adopted by the State Board of Regents), Roth protested in federal district court because he was not provided with an opportunity to challenge the decision. Roth argued that the nonrenewal of his contract was pretextual, and that the real reason was to punish him for his outspoken behavior.[42]

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[37] Justice Powell was joined by Chief Justice Burger and Justices Rehnquist and O'Connor in reaching this conclusion. In *Wygant*, the focus is on the scopes of individual affirmative action places as measured by the degree of an agency's or organization's past pattern and practice of segregation or discrimination.

[38] *Id.* at 276-277. For a non-school employment decision wherein the Court expressed a reluctance to burden innocent parties with affirmative action, *see* Firefighters v. Stotts, 467 U.S. 561 (1984).

[39] *Id.* For an excellent contemporary article treating the significance of *Wygant*, *see* Siegel, *Requisites for Affirmative Action: What Do Wygant, Sheet Metalworkers and Firefighters Mean?*, 38 West's Educ. L. Rptr. 399 (1987).

[40] 408 U.S. 564 (1972). *See also* Arnett v. Kennedy, 416 U.S. 134 (1974) for the Burger Court's treatment of factors affecting the extent of due process procedures to be followed in employment termination situations.

[41] 408 U.S. 593 (1972).

In *Roth*, the Burger Court dealt specifically with the issue of whether or not Roth had a constitutional right to a statement of reasons and a hearing on the University's decision to nonrenew him for another year. The Court held that procedural due process applies only to interests encompassed by the fourteenth amendment; i.e., liberty and property. When these interests are present, said the Court, a hearing is necessary.[43] In this case, however, since Roth had not shown the presence of a specific liberty or property interest, procedural due process was not required.

Perry v. Sindermann involved a teacher in the Texas community college system who was terminated after successfully teaching for ten years in the system — the last four years of which were served under successive one-year contracts. Sindermann was provided with neither reasons for his termination nor a hearing to challenge the basis for that decision.[44]

Claiming in federal district court, as Roth did in the previous case, that his nonrenewal was pretextual (to punish him for his political criticisms of the college administration), Sindermann alleged that the failure to grant him a hearing violated his procedural due process. The district court held for the college officials, the Court of Appeals for the Fifth Circuit reversed, and certiorari was granted.

In what can be characterized as a departure from the traditional principles of public school law, the Burger Court held that Sindermann's lack of contractual or tenure rights to reemployment did not defeat his argument that his nonrenewal violated his first and fourteenth amendment entitlements. In fact, in the Court's view, his right to reemployment was immaterial to his "free speech" claim. And, since Sindermann had not fully shown that his nonrenewal was actually based on his public criticisms of his superiors, a full exploration of that matter should be undertaken.[45]

Next, the Court focused upon Sindermann's property interests in employment. In the Burger Court's opinion, a teacher like Sindermann, who held his position for a number of years, might be able to show from the circumstances, and other relevant factors, that he has a "legitimate claim of entitlement to job tenure."[46] In other words, there exists the possibility of a teacher establishing a property interest in employment through a common law or de facto tenure status. Thus, since Sindermann had more than a mere unilateral expectancy of continued employment, he was entitled to basic procedural due process.

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[42] *Roth*, 408 U.S. 564.

[43] *Id.* at 578. In Arnett v. Kennedy, 416 U.S. 134 (1974), the Burger Court held that the process due to a teacher should be determined by such factors as the nature of the employee's property or liberty interest involved and the seriousness of the loss that will be suffered by the employee.

[44] *Sindermann*, 408 U.S. 593.

[45] *Id.* at 597.

[46] *Id. See also* Paul v. Davis, 424 U.S. 693 (1976), for a look at the Burger Court's "stigma-plus" test.

Suffice it to say, the decisions in *Roth* and *Sindermann* proved to have a profound impact on employment in public school districts. For example, the impact of these two decisions forced boards of education and school administrators to reexamine the existing policies and past practices of their school systems. Taken together, *Roth* and *Sindermann* seemed to imply that even nontenured employees could reap the benefits of due process protections (procedural and substantive) where a valid contract existed. However, several questions remained unanswered regarding the degree and scope of procedural due process guaranteed in specific employment situations.

In 1985, the Burger Court clarified its views on employee procedural due process when it handed down *Cleveland Board of Education v. Loudermill*.[47] Loudermill had contested his termination as a school system security guard, because he had not been given a pretermination hearing. Under Ohio law, no such hearing was required.

In rendering the decision, the Burger Court, in an opinion written by Justice White, took the opportunity to sketch out the elements of minimal procedural due process. A tenured employee, said the Court, should receive notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present reasons why he should not be discharged. A pretermination hearing, said Justice White, could assist in the process of determining whether or not the charges against an employee are true and supported by the evidence.[48]

Knowing what basic elements comprised minimal procedural due process proved valuable for local boards of education as they decided not to reemploy certain tenured employees. And it will be wise to follow advice given in a legal commentary written shortly after the *Loudermill* opinion was announced: "When facts are in dispute, courts will cite *Loudermill* to support the position that greater protections are required and the position that an opportunity to respond is all that is constitutionally mandated."[49]

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[47] 470 U.S. 532 (1985). For an earlier, non-school case dealing with fundamental due process for public employees, *see* Bishop v. Wood, 426 U.S. 341 (1976).

[48] *Loudermill*, 470 U.S. 532. *See* Loudermill v. Cleveland Bd. of Educ., 844 F.2d. 304 (6th Cir. 1988), where this matter was decided on remand from the Supreme Court.

[49] Gerstman, *Minimal Procedural Safeguards for Dismissal of Tenured Public Employees: Cleveland Board of Education v. Loudermill*, 24 West's Educ. L. Rptr. 695, 710 (1985). The author concluded that "[b]eyond the establishment of a minimal due process standard, *Loudermill* will not have a significant effect on court opinions."

2.5 (b) The *Mt. Healthy* Standard and Substantive Due Process

In January 1977, the Burger Court decided a case with far-reaching implications for teachers' substantive rights. The case, *Mt. Healthy City School District v. Doyle*,[50] involved the dismissal of a nontenured public school teacher in Ohio. In *Mt. Healthy*, the Court established a standard consistently followed by the lower courts in balancing local school board personnel decision-making with the substantive constitutional rights of public school employees, whether or not the employee holds tenure status.

Doyle alleged that his first and fourteenth amendment rights were violated when the school board did not renew his contract. Doyle claimed that the nonrenewal was in retaliation for his call to a local radio station in which he was critical of his principal's memorandum to teachers concerning a dress code. A federal district court agreed with Doyle and the Sixth Circuit affirmed that decision. Subsequently, the Burger Court took the case for review.

In remanding the matter to the lower court, Justice Rehnquist fashioned the following three-pronged standard to apply in future, similar situations: (1) Is there present in the conflict between the school board and the employee some element or exercise of constitutionally or statutorily protected employee conduct? (2) Did this element or exercise play a "substantial or motivating part" in the board's employment decision regarding this employee? (3) Absent this element or exercise, would the board have reached the same decision regarding this employee?[51] In Justice Rehnquist's opinion, this standard strikes a "balance between the interests of the teacher as citizen ... and the interest of the state, as employer, in promoting the efficiency of public services it performs through its employees."[52] The *Mt. Healthy* decision (especially the third prong of the above standard) reemphasized the need for school officials to be able to document their employment decisions with quantifiable and verifiable data.

The lower courts consistently applied the new *Mt. Healthy* standard in resolving both school and nonschool related employment issues. As had been done in *Roth* and *Sindermann*, the Burger Court in *Mt. Healthy* fashioned a practical standard to be used in deciding future claims of pretext and alleged violations of employees' first amendment speech guarantees.

Givhan v. Western Line Consolidated School District,[53] for example, came to the Burger Court in much the same posture as *Mt. Healthy*. While *Givhan* was pending before the Fifth Circuit, *Mt. Healthy* was decided and the three-pronged causation standard applied to the issues. Also, *Givhan* carried the Burger Court further into the thicket of teacher expression.

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[50] 429 U.S. 274 (1977).

[51] *Id.* at 274-87.

[52] *Id.* at 284. For the ultimate decision in *Mt. Healthy* on remand, *see* 670 F.2d 59 (6th Cir. 1981).

[53] 439 U.S. 410 (1979), *aff'd on remand. See also* Ayers v. Western Line Consol. School Dist., 691 F.2d 766 (5th Cir. 1982).

Bessie Givhan was dismissed from her position as a junior high school English teacher. She filed suit against her school system as an intervenor in a desegregation suit, claiming that she had been terminated because of her exercise of first amendment speech rights. At trial, the school system introduced evidence of several private encounters between Ms. Givhan and her principal in which she allegedly made "petty and unreasonable demands" in a manner described by the principal as "insulting," "loud," and "arrogant."[54] A U.S. district court held that her first amendment right was violated and ordered her reinstated.

On appeal, the Fifth Circuit reversed and remanded the case. In the appellate court's opinion, since she had made her remarks to her principal in private conversations, "her expression was not protected by the First Amendment."[55] The *Givhan* case ultimately went to the Burger Court.

In reversing and remanding the case, Justice Rehnquist broadened the scope of protected speech when he extended the first amendment to private conversations as well as public ones. In his interpretation, "Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment."[56]

Even though the subject matter of her comments was not the issue, the Burger Court put school boards and administrators on warning to be sensitive and cautious in all conversations with employees, including those conducted behind the closed doors of an office, where the matter being discussed is one of public concern. In *Givhan*, the teacher focused her remarks on allegedly racially discriminatory policies, a subject that is inherently of public concern. The protection of the first amendment was not extended to matters solely of private and personal interest to the employee.

The Burger Court further clarified and developed its views on freedom of expression in the workplace when it decided a Louisiana case, *Connick v. Myers* (1983).[57] Even though *Connick* is a noneducation case, and one different from either *Mt. Healthy* or *Givhan*, the decision is an important one in building the Burger legacy.

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[54] *Givhan*, 439 U.S. 410, 411-12.

[55] *Id.* at 413. *See* Ayers v. Western Line Consol. School Dist., 555 F.2d. 1309 (5th Cir. 1977).

[56] *Givhan*, 439 U.S. 410, 415-16.

[57] 461 U.S. 138 (1983). It is interesting to note that both *Mt. Healthy* and *Givhan* play a significant part in the Burger Court's analysis of the issues in this case.

Connick involved the dismissal of an Assistant District Attorney for New Orleans Parish (Ms. Myers), who had competently served for five and one-half years in trying criminal cases for the District Attorney's Office. The conflict began when Myers was informed by her superior (Connick) that she would be transferred to prosecute cases in another section of the criminal court. Myers was strongly opposed to the transfer and let her feelings be known. Also, she openly shared her concerns with fellow office workers.

Subsequently, Myers prepared a questionnaire soliciting the views of her fellow employees concerning such matters as the office transfer policy, office morale, the level of confidence in supervisors, and pressure on employees to work in political campaigns. Myers typed and copied the questionnaire and distributed it to fifteen assistant district attorneys in the office.

Myers was dismissed from her position for failure to accept the transfer, and for her distribution of the questionnaire. Both acts were considered insubordination. Myers filed suit in federal court contending that her employment was wrongfully terminated "because she had exercised her constitutionally protected right to free speech."[58] The district court agreed and ordered her reinstated with back pay, damages, and attorneys' fees.[59] On appeal, the Fifth Circuit affirmed.[60]

With Justices Brennan, Marshall, Blackmun and Stevens in dissent, the Supreme Court reversed the court of appeals. In an opinion delivered by Justice White, the Burger Court majority made it clear that a public employee who speaks on a matter of public concern is shielded from discharge from employment. But, where such speech concerns only the employee's personal interests, the first amendment does not apply. In the majority's view an employer is not required to tolerate any employee activities which the employer reasonably believes are disruptive to the workplace, or undermine authority, or destroy working relationships. In *Connick*, the Burger Court majority characterized Myers' questionnaire as reflecting her "personal dissatisfaction" with the transfer and not expressing a matter of general concern to her colleagues.[61]

The *Connick* opinion shows the Burger Court's continued efforts to balance the interests of public employees to exercise their constitutionally protected right of free speech (in the employment context), with the prerogatives of public employers both to protect the work environment and to promote the efficiency of the services performed by employees. The Court again underscored the importance of judging first amendment issues of speech and expression within a specific context, including the place as well as the manner and content of the expressive activity.

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[58] *Id.* at 1687.

[59] 507 F. Supp. 752 (E.D. La. 1981).

[60] 654 F.2d 719 (5th Cir. 1982). The Court of Appeals affirmed in an unpublished opinion.

[61] *Connick*, 461 U.S. 138. As Justice White stated for the majority, "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark — and certainly every criticism directed at a public official — would plant the seed of a constitutional case." For another case on point, *see* Renfroe v. Kirkpatrick, 722 F.2d 714 (11th Cir. 1984).

2.5 (c) Employee Union Activities and the First Amendment

The exercise of a public school employee's first amendment expression rights and issues of access to school property (including the character and past use of a specific location) also came before the Burger Court in the 1970s, as various union activities became the sources of litigation. In two 1972 Illinois cases, *Police Department of the City of Chicago v. Mosley*[62] and *Grayned v. City of Rockford*,[63] for example, Justice Marshall delivered opinions in which the constitutionality of local ordinances related to picketing on or near school property was weighed.

In *Mosley*, the Court held that separating peaceful labor picketing of schools from other forms of peaceful picketing was an impermissible distinction violative of equal protection.[64] And, in *Grayned*, Justice Marshall expanded the first amendment's protections of picketing when he said, "Government has no power to restrict such activity because of its message."[65] However, in the *Grayned* opinion Justice Marshall balanced the constitutional protection for one to speak out with the prerogatives of school officials to control the school's environment. Marshall made it clear that government may regulate the time, place, and manner of such activities. In what might be interpreted as a statement supporting the authority of school officials to control their schools, Marshall concluded the opinion by saying that the compelling interest of government to provide an "undisrupted school session conducive to the students' learning ... does not unnecessarily interfere with First Amendment rights."[66]

Four years later, the Burger Court heard a different type of union question when it took a Wisconsin case involving teachers who had been fired for engaging in an illegal strike. The Wisconsin code prohibited teacher strikes, but eighty-six teachers struck after negotiations by the association had failed in the case of *Hortonville Joint School District No.1 v. Hortonville Education Association*.[67] Subsequently, after reminding the teachers of the state law, and inviting them to return to work, the school board voted to dismiss the teachers when they refused to comply with the law. The Burger Court found that the board had acted reasonably, and upheld the dismissal of the eighty-six striking teachers.

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[62] 408 U.S. 92 (1972).
[63] 408 U.S. 104 (1972).
[64] *Mosley*, 408 U.S. 92, 117.
[65] *Grayned*, 408 U.S. 104, 120.
[66] *Id.*

In another Wisconsin union case in that year (1976), *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*,[68] the Court held that a teacher (who was not a union representative) has a right to speak out at a meeting of the local school board on a subject under negotiations. Such statements do not constitute negotiations, the Court ruled, for the teachers had not attempted to bargain, nor were they authorized to do so. In making its ruling to reverse and remand the case, the Burger Court added that a school board meeting is a public meeting, and to deny teachers the right to speak would inhibit all such speech.

During the 1977 term, in *Abood v. Detroit Board of Education*,[69] the Burger Court also ruled that a teachers' union could require nonmembers to pay a service charge to cover expenses of activities related to bargaining, but it could not require them to pay for the support of political and ideological activities. In the Court's opinion, such a requirement would violate their first amendment rights.

Six years later, in *Perry Education Association v. Perry Local Educators' Association* (1983),[70] the Burger Court was faced with another union question, this one involving access to school facilities. More specifically, the controversy focused on the teachers' exclusive bargaining agent and access to intra-school mail facilities. By a vote of 5-4, the Court held that the first amendment was not violated when the teachers' exclusive bargaining agent is granted access to school mail facilities, while representatives of the rival union are not. In the opinion of the Burger majority, where a public forum exists, all persons have a constitutional right to access. However, warned the Court, the state may restrict access where there exists a compelling reason to do so.

The *Perry* opinion should not be interpreted as granting public school officials permission to simply "pick and choose" subjects or speakers. The Burger Court made it clear that the nature, function, and past practice of using the forum (elements that establish the purpose of the forum) must be examined and evaluated before access is granted, denied, or withdrawn. And, the Court drew a clear distinction between speakers with a single viewpoint and those whose subject fits the special purpose for which the forum exists.

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[67] 426 U.S. 482 (1976).

[68] 429 U.S. 167 (1976). The Burger Court majority considered teachers to be the "very core" of the school system. Thus, to restrain "teachers' expressions to the board on matters involving the operation of the schools would seriously impair the board's ability to govern the district ...".

[69] 431 U.S. 209 (1977). Justice Stewart delivered the Court's opinion.

[70] 460 U.S. 37 (1983).

A few years later, in *Chicago Teachers' Union v. Hudson*,[71] another case involving teachers' bargaining agents, Justice Stevens, writing for the Court, held that requiring nonunion employees to support their collective-bargaining representative has an impact on their first amendment rights, and "may well interfere in some way with the employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." To Stevens, "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending."[72]

2.5 (d) Right to Association: Loyalty Oaths

Throughout the history of American public education patriotic loyalties, or the lack thereof, of public school personnel have been a subject of concern to school officials. Over the years, courts of law, including the Supreme Court, and state legislatures have had to deal with these issues on several occasions. The right to association and issues of employee loyalty oaths did not come before the Burger Court until the early 1970s. In two cases the Court upheld loyalty oaths with a positive affirmation, in each instance with a *per curiam* opinion.

In *Ohlson v. Phillips* (1970), the Burger Court upheld a Colorado oath that required the teacher to "solemnly swear (affirm) that I will uphold the Constitution of the United States and the constitution of the State of Colorado, and I will faithfully perform the duties of the position upon which I am about to enter."[73] In a Florida case, *Connell v. Higginbotham* (1971), the Court upheld a similar provision, but ruled as being unconstitutional another provision of the oath that required a teacher to swear that he does not "believe in the overthrow of the government of the United States or the state of Florida by force or violence."[74] In *Connell*, the Burger Court continued to recognize that states have a right to protect pupils from subversive influences, but recognized that teachers, as citizens, have a right to association. Membership in an unpopular or even subversive association may not be grounds for dismissal from employment.

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[71] 475 U.S. 292 (1986).
[72] *Id.* at 310.
[73] 397 U.S. 317 (1970).
[74] 403 U.S. 207 (1971).

Almost a decade later, the question of employee loyalty came before the Burger Court in a different form when the Court heard *Ambach v. Norwick* (1979).[75] At issue in *Ambach* was a New York statute that denied employment to aliens (those eligible for U.S. citizenship, but who refused to seek naturalization), who wished to become elementary and secondary school teachers. In upholding that law, Justice Powell delivered an opinion which stressed the legitimacy of the state's interest in setting a citizenship qualification for its public school teachers. This last point should prove especially helpful to states located where aliens can cross their borders illegally.

2.6 Other Employment Issues

By statute, states set minimum standards for teacher certification. As a general rule, localities are permitted to set additional requirements for their new and continuing employees. The traditional rule is that courts of law will not interfere with this process. These state and local requirements will withstand judicial scrutiny, provided they are reasonable and not misused.

The authority of local school boards to require academic standards of certification for teachers, more rigorous than those mandated by the state, came before the Burger Court in a 1979 case out of Oklahoma, *Harrah Independent School District v. Martin*.[76] Martin's contract was nonrenewed for her persistent refusal to comply with her local board's contractual requirement that teachers holding only a bachelor's degree earn five semester hours credit every three years. As a tenured teacher, argued Martin, she could not be discharged under the school board's purely prospective rule establishing contract nonrenewal as a sanction for violations of the continuing education requirements incorporated into her contract. She was willing, however, to forego pay raises, which was the routine sanction for refusal to comply.[77]

In a *per curiam* decision reversing the appellate court, the Burger Court upheld the board's nonrenewal, saying that the "constitutional permissibility of a sanction imposed to enforce a valid governmental rule ... is not tested by the willingness of those governed by the rule to accept the consequences of noncompliance."[78] In the Court's view, the sanction of contract nonrenewal was rationally related to the board's objective of enforcing the continuing education obligation of its teachers.

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[75] 441 U.S. 68 (1979).

[76] 440 U.S. 194 (1979).

[77] *Id.* at 201.

[78] *Id.*

On another matter, the extent of the federal government's regulatory authority over private school employment decision-making has been and remains a subject of debate. As demonstrated earlier in this chapter, there is no question that federal agencies can and do affect what public employers do in conducting their day-to-day operations. But, what about the private schools?

In 1979, the Burger Court granted certiorari in a school employment case out of private education which some experts saw as a surprise. In *National Labor Relations Board v. Catholic Bishop of Chicago*,[79] the Court considered two questions: (1) Whether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act; and (2) if the Act authorizes such jurisdiction, does its exercise violate the guarantees of the religion clauses of the first amendment?

Noting that the NLRB's assertion of jurisdiction was a relatively recent development, the Burger Court changed the entire character of the case when it saw the issues as more "commerce" than "education" oriented. The Court used as precedent the NLRB's jurisdiction over "all private, nonprofit, educational institutions with gross annual revenues that meet its jurisdictional requirements whether they are secular or religious."[80] What originally had been an education matter was now resolved as a business matter.

Acknowledging that the NLRB's exercise of jurisdiction has possible entanglement implications for the church-teacher relationship in a church-operated school, the Burger Court nevertheless turned to an examination of the legislative history of the National Labor Relations Act itself. By a vote of 5-4, the Court held that the jurisdiction of the NLRB did not extend to lay teachers employed by church-operated schools.[81] In Chief Justice Burger's opinion, the absence of clear language regarding Congress' intent to bring teachers in church-operated schools within the jurisdiction of the NLRB, made it unnecessary to resolve the first amendment religion questions in this case.[82] Thus, some important issues were left open for consideration by a future court.

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[79] 440 U.S. 490 (1979).
[80] *Id.* at 504-07.
[81] *Id.* at 507.
[82] *Id.*

CHAPTER THREE

THE BURGER COURT ON STUDENT ISSUES

3.0 Introduction

Prior to the Burger era, the Supreme Court rarely handed down an opinion in which students were the central issue. Two flag salute cases of the 1940s treated student speech.[1] Further, cases involving religious practices focused more on the meaning of the two religion clauses than on students and their rights.[2] Although decisions involving race dealt with pupil assignments to schools, the real issue was the legality of constitutional and statutory provisions reflecting long-standing social, economic, and legal practices. A real breakthrough, however, was the *Tinker v. Des Moines Independent School District* (1969) decision which led to the recognition of more rights for students and set the stage for an increased number of opinions involving students by the Burger Court.[3] These opinions also covered a broad spectrum of issues which helped clarify the rights of students versus the authority of school officials. The Burger Court was faced with the issue of deciding how much freedom students have to engage in speech that is deemed to be unacceptable by school officials. It also entertained the question of the right of students to receive information, that is, to have access to printed matter that school officials believe does not meet standards of decency.

Questions involving discipline were discussed on a number of occasions by the Burger Court. Cases in this domain involved the application of due process under the fourteenth amendment to disciplinary matters and the application of the eighth amendment to corporal punishment.

Another area addressed by the Burger Court involved the application of the fourth amendment to students. This Court enunciated two broad criteria that justify search and seizure by school personnel. The rights of alien children in the school setting were also addressed by the Burger Court. Issues involved the right of these children to attend public schools as well as their right to attend public schools without payment of tuition.

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[1] *See* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) and West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). In *Minersville*, the Supreme Court upheld a flag salute requirement but reversed itself in *Barnette* by ruling that a student could not be compelled to participate in the flag salute if the practice conflicted with his religious beliefs.

[2] *See, e.g.*, Illinois *ex rel.* McCollum v. Board of Educ. of School Dist. No. 71, 333 U.S. 203 (1948) in which release time for religious instruction within the schools was invalidated; Zorach v. Clauson, 343 U.S. 306 (1952) in which dismissed time for religious instruction away from schools was upheld; Engel v. Vitale, 370 U.S. 421 (1962) in which the Court declared as unconstitutional a state-authored prayer for use in public schools. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1963) in which prayer and Bible reading as religious exercises were declared unconstitutional.

[3] 393 U.S. 503 (1969). The Supreme Court stated that students have rights under the Constitution, including freedom of speech which can be curtailed only for reason of material or substantial disruption.

The Burger Court also focused on the rights of handicapped children to receive a public education at state expense. Not only were substantive rights discussed, but also issues involving related services and reimbursement for special costs of special education programming were reviewed.

Finally, the Burger Court ruled on issues involving students and the educational program. A number of these questions treated some facet of religion and religious practices, including prayer, Bible clubs, display of the Ten Commandments, and exemption from compulsory attendance statutes. What follows in this chapter is the record of the Burger Court and a review and analysis of its decisions in the six areas mentioned above.

3.1 Speech

During the Burger years, the Supreme Court handed down four key decisions affecting speech which will be discussed in this section. Two of them, involving higher education, were decided in 1972 and 1973, while the other two, involving elementary and secondary schools, were decided in the following decade. Although the four cases treated a number of questions about various facets of student speech in a very broad sense, they involved common factors of student rights under the first amendment, including the recognition of a controversial student organization, distribution of an alleged obscene newspaper on campus, student access to library books that school board members deemed to be objectionable, and the right of students to engage in speech believed to be inappropriate by school officials. Thus, the Burger Court, in these four cases, dealt with student freedom of the press, freedom of association, and freedom of speech. The Supreme Court took a strong position on behalf of the students in three of the cases, while it gave strong affirmation to school officials in the last case the Court decided on this issue.

It should be remembered that the general tenor of the country was very different in the early 1970s as compared to a decade or fifteen years later. As the Burger Court first began to function, the civil rights movement was at its peak. College sit-ins, demonstrations, and protests, challenges to administrative authority, and uninhibited dress and use of language characterized much of society. Against that backdrop, college officials were faced with an awesome responsibility of preserving order and maintaining stability on campus while balancing the rights of students to engage in expression protected by the Constitution. It is remarkable that only two cases involving the broad area of student speech were ruled upon by the Burger Court during this tumultuous period. In one case, *Healy v. James* (1972),[4] the justices held that students had considerable freedom in establishing organizations and in meeting on campus. That freedom can be denied only under one condition, i.e., the group's refusal to abide by reasonable campus rules and regulations. Concern of administrators over what might happen is insufficient reason for denial of recognition. Thus, the Supreme Court relied, in part, on the *Tinker* test of evidence of substantial or material disruption. The college president in *Healy* had denied the organization's application on the basis that he feared the organization would advocate violence and disruption; however, the burden of proof was on the administration to justify the necessity of nonrecognition, and that burden had not been met.

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[4] 408 U.S. 169 (1972).

This case began after a group of students at Central Connecticut State College had gone through the administrative process of applying for recognition of a local chapter of Students for a Democratic Society (SDS). Once the paperwork was properly completed, the Student Affairs Committee of the college approved the application. The college president overruled the committee and denied the application on the basis that, given the reputation of the SDS, it would advocate violence and disruption and thus would not be in the interest of the college. Students challenged the president's decision, and the case went through the federal courts. Both the district court and the court of appeals upheld the president's actions; however, the Supreme Court reversed the decision of the lower courts. It held that the students' rights to association under the first amendment were violated. By failing to recognize the organization, the president had created a situation which made it virtually impossible for students to meet and discuss their ideas.

The Court held that the college was bound to accord equal treatment to all organizations that apply for recognition, provided one condition is met, i.e., the organization must agree to conform to all school rules. The Court went one step further and noted that these rules must be reasonable. It rejected as unacceptable three possible reasons why the administration may have denied the application. One, the local group's assumed relationship with the national SDS created unfounded apprehension on the part of the administration. Two, fear of disruption was unsupported. The Court's reasoning was based on the *Tinker* standard and was applicable to higher education as well as to public schools. Three, the administration's disagreement with the group's philosophy was insufficient cause for nonrecognition since the Supreme Court had reaffirmed over a number of years that universities are marketplaces of ideas where diverse opinions and ideas are aired and debated in a climate in which individuals grow academically and the institution prospers. Thus, the Court ruled that the president's actions were unjustified, since there was no evidence of substantial disruption or of a compromise of the educational process.

In the year following the *Healy* decision the Court handed down an opinion involving freedom of the student press. In *Papish v. Board of Curators* (1973),[5] the justices decided that students have considerable freedom in expressing themselves. This case was triggered by students distributing an allegedly obscene newspaper on campus at the University of Missouri. The paper contained a picture of a policeman raping the Statue of Liberty and the Goddess of Justice. It also contained an article entitled "M----- f----- Acquitted."

One student was expelled for distribution of the paper, the content of which was deemed to be in violation of the institution's code of conduct. The code stated that students must "observe generally accepted standards of conduct" and specifically forbade "indecent conduct or speech." Campus officials alleged that distribution of the paper violated both of these conditions.

The Supreme Court ruled against the college administration. It held that the content of the newspaper was not obscene under prevailing criteria of obscenity; therefore, it was protected by the first amendment. It ruled that the student had been expelled because of the content of the paper rather than for violation of distribution restrictions under conditions of time, place, and manner standards. It noted further that, on balance, a university could not subordinate students' freedom of expression to its own interest in teaching conventions of decency in the use of language and pictures. In effect, this meant that freedom of speech under the first amendment did not involve a dual standard, one for citizens in general and a lesser one for college students. Rather, speech rights of students cannot be curtailed simply because students are enrolled in college.

Both *Healy* and *Papish* represented an expansion of student rights at a time when young people were very active in challenging many conventional rules and mores. The Supreme Court did not see a need for restricting student speech for any greater good that might have accrued to the college administration. Instead, in accord with previous Supreme Courts, the justices saw the wisdom of allowing young people considerable latitude in expressing themselves, a right that is to be cherished and vigorously defended.

More recently, the Burger Court handed down two opinions involving secondary school students. Moreover, both these opinions spoke more directly to the rights of these students under the first amendment than did *Healy* and *Papish*. In doing so, the justices provided some mixed signals. Whereas *Papish* involved the right of students to send out information, *Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico* (1982)[6] involved the right of school boards to prescribe curricula, including selection of books and their removal from library shelves. Implicit in this issue are two points of view. One view perceives the school as a place for the transmission of knowledge, culture, and community values. This point of view would accord school personnel the right and possibly, the duty, to indoctrinate students according to predetermined values. The other viewpoint sees schools as marketplaces of ideas where students are encouraged to think, explore, and come in contact with a variety of concepts.

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[5] 410 U.S. 667 (1973).

The school board of Island Trees Union Free School District No. 26 ascribed to the former viewpoint. Three of its members obtained a list of objectionable books at a conference. They learned that a number of the books on that list were in the high school library.[7] Board members asked that these books be forwarded to the board office after which members referred to them as "anti-American, anti-Christian, anti-Semitic, and just plain filthy." The board believed its duty was to protect students from moral danger as much as from physical and mental dangers. It appointed a review committee of four parents and four members of the school staff to read the listed books and recommend whether to retain them. Criteria for review included "educational suitability, good taste, relevance, appropriateness to age and grade level." After the committee deliberated, it made five different recommendations. The school board rejected the committee's report and decided that only one book (*Laughing Boy*) should be returned to the high school library and the other books should be removed.

Five students brought suit, charging the board with removing books and forbidding their use simply because certain passages offended their "social, political, and moral tastes," not because the books lacked any educational value. They alleged that their first amendment rights had been violated. Therefore, they sought to have the books restored to the library shelves and asked that the board refrain from interfering with the use of these books by students.

The substantive question before the Supreme Court was: Does the first amendment restrain a school board from removing books from school libraries? If so, do students have the right to bring suit? In responding to these questions, the Supreme Court handed down a total of six opinions with Justice Brennan writing for the majority. Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor dissented.

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[6] 457 U.S. 853 (1982).

[7] The list included the following book titles in the local junior high and school libraries: *Laughing Boy, Black Boy, Go Ask Alice, Best Short Stories by Negro Writers, The Naked Ape, Down These Mean Streets, Soul on Ice, A Hero Ain't Nothing But a Sandwich, A Reader for Writers*, and *Slaughterhouse Five*. An eleventh book, *The Fixer*, was included in the twelfth grade curriculum and also made the school board list.

In his opinion, Justice Brennan sided with the point of view that schools are a marketplace of ideas. He stated that a school board may apply and establish its curricula in such a way as to transmit community values — social, moral, or political — but this action must be consistent with the first amendment. That amendment protects students in fostering self-expression and affords them access to debate, discussion, and dissemination of information and ideas. It protects students in receiving speech as well as in sending it. "More importantly," wrote Brennan, "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."[8]

Justice Brennan saw a school library as being a special place for the recognition of first amendment rights of students. Students voluntarily use it, their selection of books is freely chosen, and they become enriched through self-education and reading.

Within this context, a school board has considerable discretion in determining the content of school libraries. However, this discretion is less than in curriculum matters, and it may not be exercised along narrow partisan political lines. However, the Court was unable to answer this question since only a plurality agreed.

With respect to the second question, the plurality agreed that students may sue their school board for a denial of their rights. Here, the board had acted, at best, with questionable standards. It had rejected the advice of literary experts, views of professionals within the school system, and the guidance of publications that rate books for junior and high school students. It removed the books because it did not like them, but that standard constituted insufficient cause.

Justice White, in concurring, saw no justification for deciding any constitutional issue at this point. He provided the majority necessary to affirm the appeals court's holding that summary judgment for the board had been improperly granted. Blackmun, also concurring, had reservations about the right of students to receive books in a school library. In dissent, Chief Justice Burger argued that school boards, not federal judges and teenagers, do and should administer schools. He asserted that morality, good taste, and relevance to education are valid reasons for determining the contents of a school library. Further, he approved the removal of books that are "pervasively vulgar."

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[8] *Pico*, 457 U.S. 853.

The last of the four cases involving student speech coincided with Chief Justice Burger's last day on the Court. That decision shifted the balance of control from students to school officials. *Bethel School District v. Fraser* (1986)[9] empowered school officials to exercise broad discretionary authority in determining what is inappropriate speech of students and in disciplining them for using it. The decision has the potential to have considerable impact on administrative control of student speech, probably the greatest impact of any decision since *Tinker.*

Fraser involved a speech by a seventeen-year-old honor student in a high school assembly. The student, Matthew Fraser, nominated a fellow student for a position on the student government. He used sexual innuendo and metaphors in his speech:

> I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most of all his belief in you, the students at Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds. Jeff is a man who will go to the very end — even the climax, for each and every one of you. So vote for Jeff for ASB vice-president — he'll never come between you and the best our high school can be.[10]

The discipline of Fraser which followed his speech was based on a school board policy which provided that "conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."[11] The discipline involved Fraser's suspension and the removal of his name from a list of possible graduation speakers. Fraser then went through three levels of judicial review prior to the Supreme Court decision.

The first level of judicial review involved the school's grievance mechanism. It took the form of a hearing officer who, after hearing the evidence, concluded that the speech was "indecent, lewd, and offensive to the modesty of the students and faculty in attendance at the assembly."[12] The officer ruled that the speech was obscene in the ordinary meaning of the term. A federal district court ruled that Fraser's rights under both the first and fourteenth amendments had been violated and awarded him $278 in damages and $12,750 in costs and attorneys' fees. The Court of Appeals for the Ninth Circuit affirmed the district court opinion.

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[9] 478 U.S. 675 (1986).

[10] *Id.* at 687.

[11] *Id.* at 678.

[12] *Id.* at 685.

On appeal, the Supreme Court ruled in favor of the school district. Speaking for the majority, Chief Justice Burger held that the first amendment does not protect students in the use of vulgar and offensive language in public discourse. "Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions . . . . The determination of what manner of speech in the classroom or in assembly is inappropriate properly rests with the school board."[13]

The majority noted that children's rights are not coextensive with those of adults. It also noted that this case is different from *Tinker*. Whereas *Tinker* involved a political message, Fraser's speech involved sexual content. *Tinker* involved nondisruptive, passive expression of a political viewpoint; Fraser intruded on the work of the schools and the rights of students.

Burger next identified the purposes of American education, a stance that aligned him with the point of view that schools are a place for the transmission of knowledge, culture, and community values. Among other purposes, Burger cited education as preparing individuals for citizenship, inculcating habits and manners of civility as values in themselves, and instilling fundamental values necessary for the maintenance of a democratic political system. Although these purposes provide opportunity for divergent views, they must also take into consideration the sensibilities of others. On balance, society's interest in teaching students the boundaries of socially inappropriate behavior outweighed individual student freedom. According to Burger, "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."[14]

The Supreme Court looked at two broad issues with respect to a school's disciplinary authority. First, it held that Fraser's due process rights were not violated. Burger held that Fraser had fair warning that giving the speech could result in sanctions. He noted that a list is not necessary for determining what is unacceptable, since the nature of this kind of misbehavior is not so egregious as criminal activity.

The second broad issue involved the kind of speech for which students can be punished. Although the Court held that students can be disciplined for the use of vulgar and offensive language, those terms did not appear in the school's conduct code; the terms "obscene" and "profane" did.

The Supreme Court decided *Fraser* largely on the content of the speech. In viewing the content, the majority decided not only that the speech was inappropriate but also "the determination of what manner of speech in the classroom or in assembly is inappropriate properly rests with the school board."[15] This standard serves as recognition that not all student speech is protected by the first amendment. The use of vulgar and offensive language in public discourse is not protected. "Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions."[16]

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[13] *Id.* at 683.

[14] *Id.*

This decision affirmed that *in loco parentis* is still alive in the public schools. Acting under color of this doctrine, school personnel have some responsibility for protecting children from exposure to sexually explicit, indecent, or lewd speech. In this respect schools may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that "tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy."[17]

Factual dispute arose over the effect Fraser's speech had on his intended audience, but it was clear that there was some degree of disturbance, embarrassment, and bewilderment. However, the end result of the speech was not the pivotal issue on which the case revolved. Rather, it was the content of the speech itself. *Fraser* involved a sexual message clothed in a political campaign speech. In the eyes of the Court, however, this was not a political campaign message but rather a sexual statement. It involved a statement which intruded on the work of the school as well as on the rights of students.

Fraser is important in that it established that student speech may be limited for reasons other than disruption; in this respect *Fraser* extends *Tinker*. The Court held that student speech may be limited when it interferes with the legitimate rights of others, but it was not made clear what rights were actually affected. Presumably, legitimate rights of students include the right to hear but not the right to hear everything. Acceptable discourse in a locker room may not be acceptable in a school assembly. The nature of the school setting itself does not allow a student as much freedom for exercise of speech as do some nonschool settings.

Justices Marshall and Stevens dissented. Marshall did not believe that the school district demonstrated adequately that Fraser's remarks were disruptive. In a lengthier dissent, Stevens asserted that, before a student is to be punished, he should be entitled to fair notice of the scope of the prohibition and the consequence of the violation.

Justice Brennan, who concurred, would have limited the ruling to the right of school officials to restrict a student's use of disruptive language in a high school assembly. He did not believe that the remarks were vulgar or lewd. Further, he believed that local school officials were better qualified than judges to decide what is appropriate or inappropriate speech.

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[15] *Id.*
[16] *Id.*
[17] *Id.*

3.2 Discipline

Discipline was an area in which the Burger Court was very active in resolving student-administrator differences. These decisions opened new arenas in litigation before the Supreme Court, for prior to this time, the justices had not directly addressed the matter of school board and school administrator authority in managing pupil behavior. That noninvolvement began to change six years into the Burger Court era when, in 1975, the Court handed down three opinions, two of them landmark decisions. In the next seven years, the justices handed down four additional opinions, each having considerable impact on the right of school officials to punish students as well as on the limitations surrounding such punishment.

What follows in this section is an examination of three rather clearly defined areas of pupil discipline as determined by Supreme Court opinions. Two of those areas involved specific application of the federal Constitution, the eighth amendment's prohibition against cruel and unusual punishment and the application of the fourteenth amendment's due process clause to suspension cases. The third area involved the right of school officials to make and enforce policy that impacts directly on discipline of students.

With respect to corporal punishment, the Supreme Court affirmed, in a memorandum opinion, that corporal punishment may be administered to students. Further, this may be done over the objections of parents. In *Baker v. Owen* (1975),[18] the Court affirmed the legality of this practice. The opinion came at a time when a number of people had been working for its demise, holding it to be barbaric, psychologically unsound for children and young adults, and inconsistent with principles of learning. Their position ran counter to the statutes of most states which allowed it, either explicitly or implicitly.

Baker arose out of North Carolina. Although the state statutes did not specifically authorize the use of corporal punishment, by implication it was allowed and had been used for many years. A parent had specifically asked school personnel not to spank her child, a sixth grader, but his teacher disregarded the request and gave the boy two licks with a desk divider for violating an announced rule against throwing kickballs during a designated play period.

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[18] 395 F. Supp. 294 (M.D.N.C.), *aff'd mem.*, 423 U.S. 907 (1975).

The boy's mother sued, charging that the statute authorizing school officials to "use reasonable force in the exercise of lawful order to restrain or correct pupils and maintain order" was unconstitutional in that it violated the parental right to determine disciplinary measures for their children. It was charged that the statute did not provide procedural safeguards covering corporal punishment and the punishment itself was cruel and unusual.

The federal district court rejected the mother's claim that she had a fundamental right to determine by whom her child should be punished. It held that the state's interest in maintaining order and discipline in the schools outweighs a parent's right to determine disciplinary measures. School officials are free to administer corporal punishment, so long as it is reasonable.

The district court also ruled that there was no violation of the eighth amendment since there was no evidence of lasting discomfort or disability from the paddling. However, the court set procedures that must be followed if corporal punishment is used. Students must be warned beforehand that specified misbehavior will result in corporal punishment. It must not be used as a first line of punishment except for acts so disruptive as to shock the conscience. A second school official or teacher must be present to witness the spanking. The student must be told the reason for the punishment before it is administered. On request, parents must be furnished with a written statement of the paddling, including the reasons for it and the names of witnesses.

It should be noted that this decision applied only to North Carolina and that the Supreme Court did not hand down a definitive ruling; rather, the justices affirmed the ruling of the district court. It was not until two years later that the Supreme Court issued a definitive opinion on the legality of corporal punishment. In *Ingraham v. Wright*,[19] the justices ruled that corporal punishment is not a violation of the eighth amendment and its prohibition against cruel and unusual punishment. It held further that, prior to a spanking, a student is not entitled to any due process provisions under the fourteenth amendment, such as notice and a hearing.

Ingraham arose out of a Florida school system after two junior high school students were spanked on the buttocks, very harshly (so it was claimed). A second adult held the youngsters while the corporal punishment was administered. After the punishment, one student needed a cushion for the better part of a week while the other student lost partial use of his arm for several days. A doctor testified that the spankings were harsh.

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[19] 430 U.S. 651 (1977). Prior to this ruling, lower courts were not in agreement on this issue.

At the time of these spankings Florida statutes allowed corporal punishment which was not degrading nor unduly severe. It also required that a teacher consult with a principal before using it.

The Supreme Court ruled 5-4 in support of school officials. Speaking for the majority, Justice Powell held that the eighth amendment is applicable only to criminal matters and does not protect one who has been corporally punished, even though it is severe. That amendment was never intended to protect school children from disciplinary abuses, since children and their parents have other avenues for challenging excessive spankings. Such avenues include a civil suit or imposition of statutory limitations on the use of corporal punishment.

In holding that a child is not entitled to due process prior to a spanking, Justice Powell noted that a hearing would impose an unjustifiable burden on the school, particularly in terms of time and personnel. With this opinion the Supreme Court reaffirmed what many school personnel had been doing for a number of years, and it saw no need to change that practice. It subscribed to the notion that school personnel are in a better position to decide what kinds of behavior should result in punishment, as well as what that punishment will be. It may be unpopular with students and against the wishes of parents, but it does not rise to the level of a constitutional issue. Therefore, school officials, not courts, are better judges of when and how to discipline students.

An area in which the Burger Court has had a greater impact on students than in corporal punishment involves procedural due process. The Court decided three cases which have helped clarify the rights of students prior to their exclusion from school. More specifically, these cases have treated the issues of due process prior to exclusion and student recourse for exclusion without due process.

The leading case on due process prior to exclusion is *Goss v. Lopez* (1975),[20] in which the Supreme Court held that in suspensions of ten days or less, the due process clause of the fourteenth amendment requires that a student be given oral or written notice of the charges against him. Further, a student who denies accusations must be given an explanation of the evidence and an opportunity to present his side of the story. In other words, the student is entitled to notice of charges and opportunity for a hearing. A hearing can immediately follow the notice; however, both should precede the suspension unless the student poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process.

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[20] 419 U.S. 565 (1975).

These two elements of due process were more than some administrators were giving students and considerably less than what many schools were already affording students. Justice White's majority opinion stated that, "We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross examine witnesses supporting the charge or to call his own witnesses to verify his version of the incident."[21] Justice White held that to do otherwise would involve too many problems for school personnel.

This litigation rose over a challenge to the Ohio codes which empowered principals to suspend a pupil for misconduct for up to ten days or to expel him. Principals were required to notify the student's parents within twenty-four hours of the suspension and state the reasons for the action. The pupil or his parents could then appeal to the board of education, at which point a hearing must be held. Acting consistently with the statute, principals in the Columbus school system suspended nine students for assorted kinds of misbehavior in early 1971. Lopez, one of the students, denied the charges of demonstrating in the school cafeteria and damaging school property.

A federal district court ruled that the students were denied due process in that no hearing was held, and it declared the statute was unconstitutional. It ruled that minimally, due process requires notice and a hearing prior to suspension.

The Supreme Court divided 5-4 on the issue with Justices White, Douglas, Brennan, Stewart, and Marshall voting in the majority. Justice Powell dissented, joined by Chief Justice Burger and Justices Blackmun and Rehnquist.

The school board argued that a student has no constitutional right to an education at public expense. It alleged that, logically, a student was thus not entitled to due process prior to being excluded from school. Justice White responded by stating that he took no position as to whether or not education is a privilege or a right under the state constitution, but students do have "legitimate claims of entitlement" to it. He ruled further that this entitlement takes the form of a property interest which may not be taken away for misconduct without some basic elements of due process. Minimally, this means that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[22] A student's liberty interests could be adversely affected in several respects. Standing with one's peers could be damaged, relationships with teachers could be strained, and one could be handicapped later in terms of higher education or employment.

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[21] *Id.* at 582.
[22] *Id.* at 583.

Justice Powell's dissenting opinion reflected concern over what he believed to be the Court's intrusion into the operation of the public schools. He stated that school officials were in the best position to determine rules applicable to student discipline. Further, he saw that a student's property interest was not undermined by a short suspension. There was no evidence that students suffered any loss of self-esteem, felt powerless, or were subjected to stigma. On the contrary, he saw a need for school personnel to be able to suspend students in the interest of maintaining order and decorum in school. Subjecting students to legal formalities interferes with that need and interest.

One month after the *Goss* decision, the Court handed down another opinion involving due process in exclusions from school. *Wood v. Strickland* (1975)[23] discussed the recourse that students have when due process is denied. The Court ruled that students may sue school board members for damages for violating their constitutionally protected rights. In this case, a local school board expelled girls for allegedly lacing punch with a malt liquor and serving it at a school-sponsored social affair. Although the board considered the incident at two different meetings, those meetings could not be characterized as providing students with due process. Neither the girls nor their parents attended the first meeting, and at the second meeting two weeks later, the board merely presented a facade of a hearing. Instead, it merely reaffirmed its earlier punishment which was expulsion for the remainder of the school term, three months.

At trial, the district court ruled that the school officials were immune from damage suits, since there had been no proof of malice. The Court of Appeals for the Eighth Circuit reversed, holding that the students had been denied due process.

The Supreme Court held that school officials do not have absolute immunity from suit; instead they enjoy qualified good faith immunity. The Court believed that some immunity was necessary to insure that school officials act in good faith within the scope of their duties. Without this immunity, boards of education will lose able and potentially able members. To insure that they need not be threatened by this holding, the Court stated that "action taken in the good faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity."[24]

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[23] 420 U.S. 308 (1975).
[24] *Id.* at 321.

The Court acknowledged that school board members may err. When they act sincerely and with a belief that they are acting properly, they are protected by the standard of qualified good faith immunity. Conversely, board members are not protected by ignorance of the law nor may they disregard what is settled, undisputed law. If they act in derogation of what is established law or in ignorance of it, they may be subject to suit. Further, if they act with malicious motives to deprive a child of a constitutional right or to injure a student, they are not immune. In spite of these limitations, school board members are not expected to predict what the law will be and to act consistently with that prediction. On remand, the Court of Appeals for the Eighth Circuit ruled that the students had been deprived of due process and were entitled to damages.

The impact of this decision was experienced at several levels. One immediate reaction was the wider scope of recognized rights of students. Not only did the Court reaffirm that students have rights under the Constitution, but it also held that, when school board members violate these rights, students may sue for damages. Another result of this decision was the clarification of a new standard of immunity for school board members, i.e., qualified good faith immunity. This places board members on a continuum somewhere between no immunity and full immunity. It suggests the necessity of school board members being apprised of court opinions affecting their decision-making, and it suggests further that board decisions be made on the bases of evidence and good faith.

It is possible that *Wood* has prompted board members to become more adept in their positions. Whereas some people feared a landslide of suits based on the *Wood* holding, that has not materialized. That it has not happened may be due to two factors. One is the increased training and responsibility of board members. Two, a decision handed down by the Supreme Court three years later made a successful suit by students more difficult. In *Carey v. Piphus* (1978),[25] the Supreme Court addressed the question of damages in relation to the deprivation of rights of students. This question actually involved two sub-questions. One, under what conditions may students be awarded damages and, two, how much in damages may students collect? The answers came in *Carey*, which involved a consolidation of two cases which resulted from the suspension of two students in unrelated incidents. The common element of the two cases was that each student was suspended without having first been granted due process as required by *Goss*.

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[25] 435 U.S. 247 (1978).

In one of the incidents, a high school freshman was believed to be smoking marijuana on campus. The principal, who had previously observed the boy, suspended him for twenty days. He then sent a suspension notice to the boy's mother and a conference was held with her. That conference was held, not to determine the guilt or innocence of the boy, but to explain the reasons for the suspension. The boy denied that he had been smoking marijuana, and his suit sought $3,000 in damages.

The second incident involved a sixth-grade boy who wore an earring to school in violation of a school regulation. The principal's justification for the rule was that it helped to minimize the activity of gangs within the school. In response, the student asserted that wearing the earring was a symbol of black pride and had no relationship to gang activity. When the boy refused to remove the earring, the principal suspended him without first conducting a due process hearing. Through his parents, the boy sued and sought $5,000 in damages.

The federal district court, applying the *Wood* standard, held that the school officials were not entitled to good faith immunity because they should have known that a suspension of this length without a hearing was in violation of due process. It refused, however, to award damages. On review, the court of appeals held that students were not entitled to recover damages for the time they were not in school in cases where school officials could show that there was just cause for their action and that they would have suspended the students even if a proper hearing had been held. It ruled further that even if the suspensions had been justified, the students would still have been entitled to recover substantial damages because they had been denied due process.

In the Supreme Court, the justices treated one major question, that of what conditions must prevail for students to recover damages for violations of their constitutional rights. In writing for a unanimous Court,[26] Justice Powell held that, in the absence of any actual injury, students were entitled only to nominal damages. Powell noted that any deprivation of due process may result in some injury, such as emotional distress. In these two cases, there was no indication that either of the two students had actually been injured. The Court then concluded that the two students were entitled to damages of $1.00 each. This amount represented a symbolic settlement, for it served to warn students that, if their constitutional rights had been denied them, they still may not be able to collect damages.[27] It also served as a warning to school officials that they must be aware of and adhere to settled constitutional law.

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[26] The vote was 8-0, with Justice Blackmun not participating.

[27] Lower courts have been more reluctant to award damages to students than to faculty members.

The third and final area of student discipline to be discussed in this section involved policy making and policy interpretation by school officials. The Supreme Court handed down two opinions, one affecting higher education and the other, the public schools. In the higher education case, *Board of Curators v. Horowitz* (1978),[28] the Court reaffirmed what courts had consistently held through the years, i.e., that educational personnel are in better position to resolve educational matters than anyone else, including the judiciary. Unlike the previous cases treated in this chapter, *Horowitz* involved academic discipline in the form of expulsion of a student from medical school. Medical school faculty claimed that Horowitz's performance in clinical work was unsatisfactory as were her relationships with peers and patients. They claimed also that she did not give sufficient attention to her personal hygiene, and she accepted criticism adversely. Prior to her expulsion, she had been given a number of warnings of the need for improvement.

Horowitz claimed a lack of due process. She argued that her dismissal from medical school stigmatized her in a way that possibly precluded her from future educational and employment opportunities. That condition, she asserted, established a liberty interest which could not be denied without due process. The Supreme Court rejected her reasoning and pointed out that she had been given adequate due process. It also noted that there is a difference between a student's failure to meet academic standards and a violation of school conduct rules. The former involves an evaluation by academic experts, including subjective judgment, whereas the latter typically focuses on factual questions.

Board of Education v. McCluskey (1982),[29] decided four years later, involved the legality of a school board's interpretation of its disciplinary policy. The policy prohibited the use of drugs on campus. A sophomore consumed alcohol at school and was suspended and subsequently expelled for the remainder of the school year. The student argued that he had not violated any policy, since the one which allegedly related to his exclusion mentioned drugs, not alcohol. According to the school board, alcohol is classified as a drug. Both the district and circuit courts agreed with the student. However, in a *per curiam* opinion, the Supreme Court reversed. It held that the school board was justified in using its own interpretation of what constituted drugs as a basis for disciplining a student. Further, the Supreme Court maintained that the two lower courts erred in replacing the board's interpretation of the policy with their own notions. It should be noted that three members of the Court were of the opinion that the issue was of insufficient gravity to warrant a full hearing.[30]

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[28] 435 U.S. 78 (1978).

[29] 458 U.S. 966 (1982).

3.3 Search and Seizure

The legality of search and seizure in the public schools was first addressed in the court systems in 1969.[31] Various state and federal courts since then have heard and resolved a number of issues, including searches of: lockers; automobiles on campus; student's person and personal effects. Other cases concerned strip searches and the use of dogs in a search. The first and only definitive ruling by the Supreme Court on the legality of the search of students in the school setting came late in the Burger Court era, in 1985. In *New Jersey v. T. L. O.* (1985),[32] the Court ruled that public school officials are not bound by the same constitutional requirements as police officers in searching students at school. Instead, it held that school personnel are subject to the standard of "reasonable grounds" rather than the "probable cause" standard of the fourth amendment. Further, these same officials are not required to have a warrant prior to a search of students.

The Court set forth two elements that constitute the reasonableness of an administrative search. First, is the action justified at its inception? That is, is it expected that the search will turn up evidence that the student is in violation of the law or of school rules? Second, was the search reasonably related to the circumstances which justified an intrusion of the student's privacy? That is, is the search reasonably related to the objective of the search and not excessively intrusive in terms of the student's age, sex, and the nature of the infraction?

This opinion is a testament to the fact that school officials have more authority under the fourth amendment in disciplining students than the Supreme Court has given them under the first amendment (freedom of speech) and under the fourteenth amendment (discipline, including due process). The justices apparently saw that the school's interest in protecting and preserving order outweighs a student's expectations of privacy and personal security. The necessity for maintenance of discipline requires some flexibility, thus the use of the standard of "reasonable grounds."

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[30] Those members were Justices Stevens, Brennan, and Marshall.

[31] In that year, courts in three states upheld school officials who searched students. They included *In re* Donaldson, 269 Cal. App. 2d 509 (1969); People v. Overton, 249 N.E.2d 366 (N.Y. 1969); and State v. Stein, 456 P.2d 1 (Kan. 1969), *cert. denied*, 397 U.S. 947 (1970). Before these decisions, two state court opinions from Tennessee entertained the legality of search of students: Phillips v. Johns, 12 Tenn. App. 354 (1930); Marlar v. Bill, 178 S.W.2d 634 (1944). From 1944-69, the question of search of students did not reach the courts.

[32] 469 U.S. 325 (1985).

T. L. O. involved a narrow issue of search and should not be interpreted as giving school officials *carte blanche* to undertake any kind of search and seizure. The very restricted question before the Court was the legality of the search of a student's purse. The justices gave no opinion on the following related questions: Does the same standard apply in the search of a student's person? Does the same standard apply in the search of lockers or desks? Is evidence which is obtained in an illegal search by school officials admissible in court?

In handing down its decision, the Supreme Court actually gave two rulings. First, it held unanimously that school officials, like police officers, are subject to the fourth amendment's ban on unreasonable searches and seizures. Then, in the substantive opinion the Court ruled that school officials are actually subject to two exceptions to the restrictions imposed on the police, the probable cause standard and the requirement of a warrant.

T. L. O. originated in a public school in New Jersey when two girls were reported to have been smoking in the restroom, a violation of school rules. When an assistant principal questioned the girls, one admitted to having smoked; T. L. O. denied that she had been smoking and avowed that she had never smoked. The assistant principal demanded to see T. L. O.'s purse. He opened it, found and removed a package of cigarettes, whereupon he accused T. L. O. of having lied to him. When he removed the cigarettes, the assistant principal noticed a package of cigarette rolling papers. His experience led him to believe that the rolling papers were closely associated with the use of marijuana. Believing that T. L. O. might be in possession of other drug matter, the administrator searched the purse further. He then found some marijuana, a pipe, empty plastic bags, a number of one-dollar bills, an index card with students' names on it, and two letters revealing T. L. O.'s involvement in marijuana dealing.

T. L. O. confessed to the police that she had sold marijuana at the high school. A juvenile court found her to be delinquent and sentenced her to one year's probation. The appellate court affirmed that the fourth amendment had not been violated, but the state's supreme court reversed. It ordered the suppression of the evidence found in T. L. O.'s purse, since the search had not been reasonable. It noted that mere possession of cigarettes, as distinguished from smoking, did not violate school rules.

The Supreme Court issued five separate opinions with Justice White writing the majority opinion. In determining that the search was legal, Justice White noted that the issue involved a balancing test—weighing an individual's expectations of privacy and personal security against the need for effective measures for dealing with the serious problem of drugs. Children have some expectations of privacy, even at school, but this must be balanced against the necessity of maintaining discipline. The legality of a search depends on the reasonableness of that search. Justice White then stated the two standards that must be weighed in a search by school personnel: Is the search justified at its inception and is it reasonable in scope? Justice White held that this latter standard was met when the search was "reasonably related to the objectives of the search and not necessarily intrusive in light of the age and sex of the student and the nature of the infraction."[33] Measured by these standards, the search was permissible. It was deemed to be reasonable on at least five counts. First, T. L. O. had been accused of smoking and had denied the accusation. Second, the assistant principal's decision to open T. L. O.'s purse to see if it contained cigarettes was reasonable in light of her denial. Third, when a package of rolling papers was observed, the assistant principal was justified in searching further. Fourth, it was reasonable to suspect that T. L. O. was carrying marijuana as well as cigarettes in her purse. Fifth, when various drug-related materials were turned up, it was reasonable to extend the search to a separate zippered compartment.

The concurring opinions represented various positions of the justices. Justice Powell noted that students at school have a lesser expectation of privacy than does the population in general. Since teachers have a special relationship with students, children are not entitled to all the constitutional rights that are due to citizens. In his concurring opinion, Justice Blackmun held that deviations from the warrant and probable cause requirements of the fourth amendment are justified only in exceptional circumstances. He saw the majority as using the balancing test as the rule rather than the exception.

Justice Brennan, joined by Justice Marshall, concurred in part and dissented in part. Brennan would have held school officials to the standard of probable cause rather than reasonable suspicion. He believed that, with very few exceptions, warrantless searches are unreasonable. Full-scale searches are reasonable under the fourth amendment only on a showing of probable cause in the belief that a crime has been committed and the search will produce evidence of that crime. "[C]ategories of intrusions that are substantially less intrusive than full-scale searches or seizures," he wrote, "may be justifiable in accordance with a balancing test even absent a warrant or probable cause, provided that the balancing test used gives sufficient weight to the privacy interests that will be infringed."[34]

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[33] *Id.* at 342.

The final opinion was written by Justice Stevens with whom Justice Marshall joined and with whom Justice Brennan joined in part. Stevens concluded that a reasonable standard for school officials to follow in undertaking a search is one that "would permit teachers and school administrators to search a student when they have reason to believe that the search will uncover evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process."[35]

In looking beyond the diverse thinking of the justices in this case, one readily concludes that this decision helped to strengthen administrative authority in managing student conduct and in helping provide a climate conducive to learning. It reaffirmed the notion that a school is a special place and students cannot always be treated like adults and accorded the full panoply of rights that adults enjoy. Administrators have considerable authority in undertaking a search, but that authority is not without limits. Their authority should be exercised carefully with due thought given to the reason for the search as well as the way the search is conducted. The holding of *T. L. O.* and sound school board policy are useful guides for search and seizure.

3.4 Aliens

In 1982 and 1983, the Supreme Court handed down opinions that influence some areas of the country more than others and affect a given class of individuals. The opinions treated the constitutional rights of aliens within the public schools. The specific questions before the Court involved the right of undocumented alien children to attend public school at state expense and their right to attend school without payment of tuition.

States in the South are particularly prone to having aliens enter their borders illegally. Large numbers of aliens have attempted to cross the 2,000-mile border that separates Mexico from the United States. Since it is impossible to patrol and police that vast expanse of territory, many adults and children have successfully entered this country illegally. The State of Texas has been particularly vulnerable. In attempting to deal with this problem, the Texas legislature enacted laws which made it more difficult for children to reap benefits from their unwarranted stay in the United States. One statute withheld from local school districts any state funds for the education of children who were not legally admitted into this country. A second statute authorized school districts to deny enrollment to such children.

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[34] *Id.* at 355.
[35] *Id.* at 378.

Subsequent to this legislation, individuals filed a class action suit in Smith County, Texas, on behalf of all children who could not establish that they had been legally admitted into the United States. Named as defendants were the superintendent of schools, members of the board of trustees, and the State of Texas.

The federal district court held that illegal aliens were entitled to equal protection under the federal Constitution, and the court of appeals affirmed. It likewise found the state statute to be unconstitutional, although it held that the district court had erred in finding that the statute was preempted by federal law.

The Supreme Court in *Plyler v. Doe*,[36] speaking through Justice Brennan, ruled that the Texas legislation violated the equal protection clause, because an alien is entitled to the equal protection of the laws which a state may choose to establish. That ruling ran counter to the position of the appellants who argued that undocumented aliens are not persons within the jurisdiction of Texas and consequently have no equal protection rights. Brennan held that both the due process and equal protection clauses were designed to protect an identical class of persons, and neither clause is of greater value or stature than the other. Aliens, in general, have been guaranteed due process by both the fifth and fourteenth amendments. Even though education is not a right guaranteed by the Constitution to individuals, and Brennan recognized that position, he restated the importance of education by drawing from earlier Court opinions.

Whenever a state classifies individuals, it "must demonstrate that the classification is reasonably adapted to 'the purposes for which the state desires to use it.'"[37] Brennan concluded that, "[i]f a State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here."[38]

Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor, strongly dissented. Burger stated that "If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example."[39] Burger argued that the Court was intruding too much into the making of social policy which is the province of a legislature. He argued also that, although the equal protection clause applies to aliens, it does not mandate equal treatment. As an indication of the lack of agreement on the protection and rights to which aliens are entitled, Justices Marshall, Blackmun, and Powell each wrote concurring opinions.

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[36] 457 U.S. 202 (1982).
[37] *Id.* at 226.
[38] *Id.* at 230.
[39] *Id.* at 244.

The second case, *Martinez v. Bynum*,[40] involved a challenge to another Texas statute, a residency law. It permitted school districts to deny tuition-free admission to public schools to a minor living apart from a "parent, guardian, or other person having lawful control of him" if his presence in the district is "for the primary purpose of attending the public free schools." Roberto Morales, a Mexican child, relocated in Texas with his sister, Oralia Martinez, for the primary purpose of attending schools there. The school district denied Martinez's application for tuition-free admission for Morales. The suit which followed alleged that the state statute was unconstitutional in that it conflicted with equal protection, due process, and the privileges and immunities clauses.

The district court denied Martinez's petition for a preliminary injunction and, after a hearing on the merits, ruled for the defendants. The Court of Appeals for the Fifth Circuit affirmed, and the Supreme Court also affirmed. Writing for the majority, Justice Powell held that a residency requirement furthers a state's interest in assuring that the services provided for its residents are enjoyed only by residents. Such a requirement is not in violation of the equal protection clause. The law means merely that a person must establish residence before demanding the services that are restricted to residents. Such a requirement helps to insure orderly planning and better operation of the schools.

Justice Powell saw that the Texas residency law required two elements: physical presence and an intention to remain. He thus viewed the Texas statute as being very generous:

> It compels a school district to permit a child such as Morales to attend school without paying tuition if he has a bona fide intention to remain in the school district indefinitely, for he would then have a reason for being there other than his desire to attend school: his intention to make his home in the district.... The statute goes further and extends these benefits to many children even if they (or their families) do not intend to remain in the district indefinitely. As long as the child is not living in the district for the sole purpose of attending school, he satisfied the statutory test.[41]

Martinez may appear to be in conflict with *Toll v. Moreno* (1982), a higher education case decided one year earlier.[42] *Toll* dealt with the right of domiciled nonimmigrant aliens to benefit from instate status for purposes of tuition and fees. A policy approved by the University of Maryland in

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[40] 461 U.S. 321 (1983).
[41] *Id.* at 332.
[42] 458 U.S. 1 (1982).

1973 specifically denied preferential treatment in tuition and fees to persons holding G-4 visa status.[43] The Supreme Court held that this policy was in conflict with the supremacy clause of the Constitution. Said the majority,

> [T]he Federal Government has not merely admitted G-4 aliens into the country; it has also permitted them to establish domicile and afforded significant tax exemptions on organizational salaries. In such circumstances, we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminatory tuition charges and fees solely on account of the federal immigration classification.[44]

Toll differs from *Martinez* in that the former did not involve students illegally in this country. Rather, it involved students legitimately in this country who did not have the same status as citizens. Further, these individuals were not here for the primary purpose of obtaining an education. Rather, they sought an education because their parents were in this country as part of employment in certain international organizations. In *Martinez*, there was evidence that alien children came to this country to live with relatives solely for the purpose of getting an education, leaving their parents' residence in Mexico.

In these opinions the Supreme Court ruled that aliens have rights protected by the Constitution, but these rights are not unlimited. While entitled to public education, aliens may not be entitled to free public education absent reasonable conditions placed on their eligibility.

3.5 Special Education

When Congress passed the Education for All Handicapped Children Act (EHA, also referred to as P.L. 94-142), it helped create the opportunity for disadvantaged children to be educated at public expense. Moreover, these children were entitled to a free public education in the least restrictive environment. In order to make that education possible, children were also entitled to related services which would help realize such an education. At the time of the passage of the Act, Congress observed that possibly twelve percent of the school age population was eligible for services as exceptional children.

Initially, the Act mandated public education for all handicapped children between ages 3 and 18 no later than September 1, 1978. It mandated the same for children ages 3-21 no later than September 1, 1980.[45]

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[43] This status involves the issuance of visas to nonimmigrant aliens who are officers or employees of certain international organizations and to members of their immediate families.

[44] *Toll*, 458 U.S. 1, 17.

The Act was written to assure a free appropriate education to all handicapped children that fits their individual needs. An individualized program was to be determined by the local education agency, the child's teacher, parents, and the child, where appropriate. This program, known as an individualized education program (IEP) indicated the following: (1) the present level of the child's educational performance; (2) annual goals and short term objectives; (3) specific education services to be provided; (4) extent to which the child can participate in the regular education program; (5) projected dates for initiation and termination of services; and (6) objective criteria and evaluative procedures to determine the efficacy of the objectives. The Act provided funds for modification or adaptation of physical facilities to serve the handicapped, and it provided funds for inservice education of teachers.

Often coupled with EHA is another act of Congress, section 504, an amendment to the Rehabilitation Act of 1973. Broader in scope than EHA, section 504 provides that:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.[46]

Originally intended to provide training and jobs for disabled persons, section 504 has since been expanded to include more categories of individuals. Now, guidelines cover people who not only have a physical or mental impairment, broadly defined, but also those who have recovered from such an impairment or who are currently regarded as being impaired. In sum, section 504 covers discrimination in employment as well as accessibility to programs. In that respect, some people have used both EHA and section 504 in filing suits alleging discrimination against the handicapped.

Southeastern Community College v. Davis[47] was the first education law case decided by the Supreme Court concerning either of these Acts. It involved the rejection of a hearing impaired individual who sought admission to a nursing program at a community college. Davis, a licensed practical nurse, desired to enroll in an associate of arts program, but the college denied her admission on two grounds. First, it relied on an audiologist's report that Davis suffered a significant hearing loss. It relied also on information from the executive director of the state Board of Nursing who stated that the loss would render Davis unable to meet the needs of patients.

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[45] An exception to this stipulation provides that children ages 3-5 and 18-21 shall not be covered if it is inconsistent with state law or controlling state decisions.

[46] 29 U.S.C. §794 (1973) and the federal regulations for implementing the law at 34 C.F.R. §104.

[47] 442 U.S. 397 (1979).

The district court ruled in favor of the college which had taken the position that Davis would have trouble completing the program and would represent a danger to future patients. The Court of Appeals for the Fourth Circuit reversed, pointing out that the Act's regulations required affirmative conduct by the college to modify its programs to accommodate the disability of the applicant.

The Supreme Court ruled that section 504 does not require institutions to make substantial modifications in their academic program to allow disabled persons to participate. All that the Act requires is that an institution make reasonable accommodations. Since Davis was unable to function in clinical courses without close supervision, her involvement in a nursing program would require fundamental curriculum changes. This, in turn, would unreasonably compromise the training normally provided in a nursing program.

Following *Davis*, the Supreme Court's next decision on the rights of the handicapped in education was handed down three years later. In *Board of Education v. Rowley*,[48] the Court ruled, in the first of two cases, on what constitutes an appropriate educational program, including the meaning of "related services" under EHA. More specifically, these two cases involved the question to what extent school boards can be required to provide special services for the handicapped which would enhance their individualized educational program. Amy Rowley's parents wanted the district to provide their daughter with an interpreter for all her academic classes. When she started school, Rowley, a deaf student, had minimal residual hearing but was an excellent lipreader. In her kindergarten program she was placed in a regular class and later provided with a hearing aid. At the same time several educators in her school took a sign language course.

At the beginning of the first grade, an IEP was developed for Amy. It provided that she would be in a regular classroom, continue to use the hearing aid and receive tutorial instruction one hour daily and speech therapy three hours weekly. Her parents agreed to the IEP but insisted on a sign language interpreter. The school district rejected the request as being cost prohibitive. An independent examiner as well as the state's Commissioner of Education affirmed the school district's decision.

In the litigation which followed, both the district and circuit courts agreed that Rowley was not receiving a free appropriate education in that her handicap affected her opportunity to achieve her full potential commensurate with the opportunity provided other children.

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[48] 458 U.S. 176 (1982).

The Supreme Court overruled the lower courts. Speaking for the majority, Justice Rehnquist first defined free appropriate education as meaning educational instruction "specifically designed at no costs to parents or guardians to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction."[49] Those services and the instruction were to be provided at public expense, meet educational standards of the state, be reasonably in accordance with grade levels in the regular educational program, and be consistent with the child's IEP.

Rehnquist noted that the EHA does not prescribe the level of education to be accorded handicapped children. He observed that the history of the Act indicated that, while Congress intended to make public education available to handicapped children, it imposed nothing beyond making it meaningful. "We think . . . that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunities provided other children.'"[50] Had the Act intended to achieve strict equality of opportunity or services, it would have imposed an entirely unworkable standard of measure. Free appropriate education does not equate with equal education. Free appropriate education requires that children be provided with specifically designed instruction, including supportive services, that would assist a handicapped child to benefit from special education.

A more definitive opinion about what is and what is not included under the rubric of related services was given by the Supreme Court in *Irving Independent School District v. Tatro* (1984).[51] The specific issue before the Court was whether a local school district could be required to provide clean intermittent catheterization during school hours so a handicapped child could attend the school district's early childhood development program. Although the parents claimed that catheterization was a related service, the school district refused to perform it, claiming that it was a medical service. It asserted that EHA's definition of related services limited medical services to those necessary for diagnostic and evaluation purposes only.

Under EHA, "related services" are defined as follows:

> [T]ransportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology,

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[49] *Id.* at 188.
[50] *Id.* at 198.
[51] 469 U.S. 883 (1984).

> psychological services, physical and occupational therapy, recreation, medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping condition.[52]

Regulations growing out of EHA extended the definition of related services to include school health services, social work services, and parent counseling. The regulations also require that a child's IEP include a list of related services to be provided.

The federal district court ruled against the parents. It concluded that catheterization was a life-support service, not one used for diagnostic and evaluation purposes; therefore the school district could not be required to perform it. The Court of Appeals for the Fifth Circuit reversed, finding that catheterization must be considered a related service because, without it, Tatro would be unable to attend school and thereby benefit from the special education to which she was entitled.

The Supreme Court treated first the question of whether catheterization should be considered as being a support service, that is, necessary for the child to benefit from special education. The justices agreed that it was a support service in that performing the catheterization enabled a child to remain in school during the day. Next, the justices asked whether catheterization should be excluded from consideration as a related service in that it was a medical service not used for diagnostic and evaluation purposes. They ruled that it could be administered by school personnel since it did not require a doctor to perform it; it could be done by a school nurse or even a teacher with a very small amount of time necessary for training. This service should be considered as being a part of school health services which the regulations include as being a part of related services.

As if to allay concerns that some people might interpret this decision as placing undue medical and financial burdens on school districts, the Court noted that the opinion had its limits. It applied only to children who were sufficiently handicapped to qualify for special education. It then was limited only to those handicapped children for whom the services were required in order to benefit from the special education. Services performed by a licensed physician were excluded from related services which a school district must provide. Also, a school district could not be required to provide nursing services or administer medication or treatment that the child could receive outside the school day.

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52. 20 U.S.C. §1401 (1976) and the federal regulations at 34 C.F.R. §300.

Tatro has not provided answers to a number of questions about what is and what is not a related service. The Burger Court provided no further guidance on this matter, leaving the question to the lower courts for resolution.

Another fertile area of litigation under EHA has been that of placement. In particular, parents and school officials have often disagreed about an appropriate placement for a child which, according to the Act, shall be in the least restrictive environment. A key controversy has often centered around a parent's insistence on a placement which would involve a greater financial commitment than a school district is willing to make. Another problem, as seen by parents, is that school districts are dilatory in assessing and appropriately placing a child. Yet another point of contention has been parents' allegations that a placement was improper because the child was not progressing. EHA requires that children be maintained in their current placement during any due process procedures regarding where the child shall be placed. Some parents have acted unilaterally and placed their children in private facilities and later sought reimbursement from the school district. Lower courts were in disagreement over whether or not these parents were entitled to recover costs for such placement, until the Supreme Court helped resolve this controversy.

In *Burlington School Committee v. Department of Education*,[53] the Supreme Court ruled that parents are entitled to recover tuition costs for placement of their children under certain conditions. If it was determined that the public school placement was inappropriate and the private school placement was appropriate, parents could recover tuition costs.

The case arose after parents, dissatisfied with the program the public school offered their learning disabled son, placed him in a private school at their own expense. An independent hearing officer decided that the school district should pay the cost of keeping the child in the private facility, but school officials claimed that the parents forfeited their right to reimbursement by their unilateral action.

The Supreme Court ruled that EHA allows courts to award parents reimbursement for private school tuition and related expenses. It stated that Congress intended to clothe the judiciary with such authority under a clause of the Act allowing courts to grant such relief as it determines is appropriate. Next, the Court held that parents do not forfeit their right to recover costs for a private school placement when they violate EHA's requirement that they shall maintain current placement during due process proceedings or secure agreement from school officials for any change. The justices acknowledged that due process can be lengthy, that it can require a year or even longer. Keeping a child in his present placement for that length of time can be unwise. In the alternative, school officials are not expected to pay for private school placement if the child is appropriately placed in the public schools. To resolve this problem, the Court ruled that parents who place a child in a private school without the consent of school officials do so at their own risk. But, where it is determined that the placement in a private facility was correct and the public school district's placement was incorrect, the parents may recover. The Court saw this as requiring a school district to pay the expenses that it should have paid all along. To school districts, the decision means two things. First, there is danger in delaying a due process hearing over proper placement of a student. Second, there is a burden on school personnel to place a child appropriately in the first instance. This would tend to minimize any desire or attempt by parents to withdraw their children from public schools and seek alternative placement. For parents, the decision means that unilateral placement of their children in private facilities involves a risk if they seek reimbursement. If they expect to be paid for such costs, they will want to be certain that their action was necessary.

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[53] 471 U.S. 359 (1985).

The Burger Court handed down one final decision involving special education. It treated the question of whether parents could recover attorneys' fees when they are successful in cases based on EHA. The Act itself does not state that attorneys' fees can be awarded to parents who prevail. Recognizing that fact, some attorneys have sought such recovery by claiming that school districts violated section 504 or section 1983 of the Civil Rights Act of 1871. Each of these Acts allows for the recovery of attorneys' fees in cases in which the plaintiff prevails. In *Smith v. Robinson*,[54] the Supreme Court ruled that parents could not use section 504 or section 1983 as vehicles for enlarging a remedy otherwise available under EHA. It ruled that Congress intended that EHA be the exclusive means for enforcing a handicapped child's right to a public education. Since school districts already have a heavy financial burden of providing an appropriate education for all handicapped children, Congress did not intend to add to that burden by requiring the payment of attorneys' fees.

3.6 Discrimination in Admissions

The Burger Court and racial discrimination warrant a separate chapter (see Chapter 4) if for no other reason than the variety of issues and the number of opinions the Court handed down. In addition to issues involving racial discrimination, the Court decided cases before it on other matters, including gender, age, and affirmative action. The last category, featuring the *Bakke* case, has been included in this chapter rather than the one on race, for it fits with the issues in this section.

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[54] 468 U.S. 992 (1984).

Most of the cases in this section involve higher education. The closest that the Supreme Court came to deciding a case involving elementary and secondary schools was in the mid-1970s. In *Vorchheimer v. School District of Philadelphia* (1977),[55] the Court deadlocked 4-4 on the question of whether one gender schools are in violation of equal protection. Justice Rehnquist did not participate in the Court's *per curiam* opinion which upheld the judgment of the Court of Appeals for the Third Circuit.

Susan Vorchheimer sought admission to Central High School, an all male facility that admitted Philadelphia's ablest academic students. Its counterpart, Girls High School, admitted only females. Vorchheimer based her suit on the allegation that Central High School had the better science program, and she needed to benefit from that program in order to be better prepared for college. Her application to Central High School was rejected solely on the basis of her gender. The district court held that the school district policy of excluding young women from the all-boys school denied girls the opportunity to attend a coeducational, academically superior high school. The circuit court reversed, finding no violation of equal protection. It noted that attendance at the two schools is voluntary and that the educational opportunities at both schools were very similar if not equal. The court observed:

> It is not for us to pass upon the wisdom of segregating boys and girls in high school. We are concerned not with the desirability of the practice but only its constitutionality. Once that threshold has been passed, it is the school board's responsibility to determine the best methods of accomplishing its mission.[56]

The Third Circuit noted that Vorchheimer had not suffered any loss and, based on the test of rational relationship, found no violation of equal protection.

In addition to *Vorchheimer* and *Bakke*, two cases arose from higher education, one involving a male and the other, a female. Neither of these two cases can be seen as having the potential to reorder the course of law.

In *Mississippi University for Women v. Hogan*,[57] the Court ruled that the institution's policy of limiting its enrollment to women was in conflict with the equal protection clause. Joe Hogan challenged that policy when he applied to a nursing program and was rejected. At the time of application Hogan was a registered nurse but not in possession of a baccalaureate degree, which he sought. He met all university admission requirements and standards except for his gender.

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[55] 532 F.2d 880 (3d Cir. 1976), *aff'd* 430 U.S. 703 (1977).

[56] *Vorcheimer*, 532 F.2d 880, 888.

[57] 458 U.S. 718 (1982).

The Supreme Court upheld the ruling of the court of appeals that the rejection of Hogan's application on the basis of gender was a denial of equal protection. Justice O'Connor, writing for the majority, rejected the state's justification for the single-sex school as compensating for discrimination against women. She held that "a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited from by the classification actually suffer a disadvantage related to the classification."[58] O'Connor noted that the state had made no showing that men lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field. Rather, the state was perpetuating the stereotypical view of nursing as being the province exclusively of women. Further, the state had not made any showing that the gender-based classification was substantially and directly related to its compensatory objective. The university did have a policy of allowing men to audit courses, but O'Connor saw this practice as undermining its claim that women are adversely affected by the presence of men.

The other case involved what has turned out to be a protracted suit by a woman seeking admission to medical school. Geraldine Cannon, an experienced nurse, applied, at various times, to the seven different medical schools in the state of Illinois. At the time of her initial application, Cannon was 39 years old. Both Northwestern University and the University of Chicago rejected her application. They discouraged admission to medical school of anyone over age 30, and their policies were to deny admission to anyone over that age unless the individual had an advanced degree. In *Cannon v. University of Chicago* (1979),[59] the plaintiff sought relief under title IX. The Supreme Court ruled that an individual has a private right of action under title IX. In relying on that statute as a basis for her suit, Cannon alleged that the universities' policies had a disparate effect on women because they traditionally interrupt their studies to pursue family nurturing. That condition, she argued, made it difficult for women to obtain advanced degrees or attend professional school prior to age 30. The Court did not rule on the substantive question of whether Cannon must be admitted to one of the medical schools.

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[58] *Id.* at 728.
[59] 441 U.S. 677 (1979).

Following the Supreme Court's 1979 decision, Cannon continued her litigation. Both the district and circuit courts dismissed her suit for failure to establish purposeful discrimination. The circuit court noted that, since *Bakke*, the standard had been "intentional discrimination," not "disparate effect" as Cannon had argued. The court also found no violation of title IX, noting that Cannon had alleged only that a facially neutral age policy had had a disparate impact upon women due to their traditional domestic role. The Supreme Court in *Cannon v. University of Chicago* (1983) declined to hear Cannon's appeal.[60]

Since the 1983 action by the Supreme Court, Cannon has persisted in her litigation. The courts have indicated their displeasure with her actions by ruling that the defendants' attorneys' fees and costs be borne by her, finding her to be in civil contempt, and forbidding Cannon's husband from representing and advising her in this litigation.

Regents of the University of California v. Bakke (1978)[61] involved the question of the legality of discrimination in favor of minority students. As if to compensate for instances of past discrimination, a number of educational institutions sought to favor minorities. This was the crux of *Bakke*, in which the University of California Medical School at Davis reserved sixteen of its 100 seats in the first-year medical class for minorities. Although the school did not define "minority," operationally it meant a "non-white student."

Of the sixteen special seats in each incoming class, minority students were rated against each other, not against the class as a whole. Whereas other students were subject to a minimum grade point average of 2.5, that standard did not apply to the sixteen positions. Minority students could qualify also for the regular admissions program, and some were admitted by this route, but no white students had ever been admitted under the sixteen-slot plan. In some years, not all of the sixteen slots were filled.

Allan Bakke sought admission to the medical school. A 36-year-old engineer, he was one of 2,644 applicants for the 100 available slots. After the university rejected his application, Bakke reapplied and competed with 3,736 other applicants. He was rejected again at which time he initiated a suit. He charged that his credentials were better than those of the applicants accepted under the special admissions plan; consequently, his rights had been violated under title VI, the state Constitution, and equal protection. The state superior court held that the program violated Bakke's rights on all three counts. It ruled that the university could not take into account race in making decisions on admissions. On appeal, the state's supreme court applied the strict scrutiny test. Although it saw that the program served a compelling state interest, it noted that there are other ways to achieve its end. It ordered that Bakke be admitted, since the university could not show that he would not have been admitted if it did not have the special program for minorities.

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[60] 648 F.2d 1104 (7th Cir. 1981) *cert. denied* 103 S. Ct. 1254 (1983).
[61] 438 U.S. 265 (1978).

The Supreme Court was clearly divided on two major issues before it. On each of the two issues Justice Powell cast the decisive vote. Five justices ruled that the special admission program was unlawful. Voting with Powell on that question were Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens. Moreover, all five agreed that the program was in violation of title VI, but only Justice Powell found it to be in violation of the equal protection clause. In speaking for the four on the title VI question, Justice Stevens wrote that race cannot be a factor that would exclude anyone from a federally funded program.

Justice Powell was not persuaded by the university's argument of calling the program a "goal" nor by Bakke's assertion that it was a "quota." To Powell, the real problem was the classification based on racial and ethnic background. He noted that equal protection cannot mean one thing to one individual and something else to a person of a different color. For equal protection to be equal, both groups must be accorded the same protection. He saw any kind of racial and ethnic distinctions to be inherently suspect, calling for the most exacting judicial examination.

The university's special admissions program purported to have four purposes. It sought to reduce the historic maltreatment of minorities, to counter the effects of societal discrimination, to increase the number of doctors who would practice in underserved communities, and to obtain educational benefits that flow from an ethnically diverse student body. Powell noted that the last purpose is constitutionally permissible, but in its implementation, the university cannot disregard the constitutional rights of all individuals.

The second major question before the Court involved the issue of whether race or ancestry can be used as a factor in admitting students to graduate programs. The justices were divided on this issue also, and again Justice Powell cast the deciding vote. On this question he sided with Justices Marshall, Brennan, White, and Blackmun. It was this voting bloc which allowed the Court to uphold affirmative action programs. The majority saw a need for the use of subjective criteria which would help an institution respond to the needs of the larger community that it serves. Subjective criteria would enable the institution to attain genuine diversity. In this respect Powell lauded the Harvard University admissions program in which it was stated that race is a factor in some admissions decisions. The Court's majority in *Bakke* pointed out that subjective criteria could not be used to the exclusion of some objective standards.

Bakke is significant in that it was the forerunner of other affirmative action suits. Later cases on this subject involved questions of employment and termination, treated in Chapter 2 of this book. The Court rejected absolute quotas, in spite of Justice Powell's pronouncement that quotas were not the key issue. The justices did not speak in *Bakke* with the same fervor against reverse discrimination that the Court did in *Brown* on discrimination against blacks; instead they recognized a degree of ambivalence throughout the country and conceded that there is no magic formula for resolving the dilemma of reverse discrimination. What the Court did was to take a middle-of-the-road position that rejected the concept of reverse discrimination but still upheld the concept of affirmative action.

3.7 Educational Program

Throughout its tenure the Burger Court was petitioned periodically to review cases affecting in some way the educational program. In fact, more education law opinions involving religion were decided by the Burger Court than any other single subject. A number of these opinions dealt with questions of financing of religious activities, and they are treated in Chapter 5. The other religion cases as well as a few others that relate to the educational program, are covered in this section. Grouping them involved some selective judgment by the authors, for various legal questions do not always fit into discrete categories. However, for the sake of convenience, the authors have identified six opinions that relate to the educational program. They involve questions related to: the legality of moments of silence and voluntary prayer; the display of the Ten Commandments; extraclass Bible Clubs; English as an official language; and exemption from compulsory attendance statutes.

The Supreme Court decided in 1962 and 1963 that school-sponsored activities, the purpose or primary effect of which was to promote or inhibit religion, were in conflict with the first amendment. For many schools these decisions negated the practice of having devotional exercises to open the school day. Since then, a number of politicians have decried the Court rulings and have frequently proposed amendments to the Constitution which would allow such exercises. Politicians have also used those Court decisions in their campaigns, including campaigns for the Presidency, and have pleaded to restore prayer and Bible reading in public schools.

The strongest statement of the Burger court on this question was *Wallace v. Jaffree* (1985).[62] It invalidated legislation passed by the Alabama

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[62] 472 U.S. 38 (1985).

General Assembly which had sought to return prayer to public schools through a series of three acts. In 1978, the General Assembly authorized a one-minute period of silence for meditation in all public schools. In 1981, the General Assembly authorized a period of silence for meditation or voluntary prayer. In the next year, the General Assembly authorized teachers to lead willing students in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the World."

Ishmael Jaffree, who had three children in Mobile County elementary schools, objected to the religious prayer services. He claimed that his children had been harmed through religious indoctrination, subjected to teacher-led religious activities on a daily basis, and exposed to ostracism by their peers. He sought class action certification and relief from the three statutes.

After a trial on the merits, the federal district court disregarded decades of court decisions and took a novel look at the meaning of the establishment clause. It concluded that the clause does not prohibit the state from establishing a religion. It dismissed Jaffree's challenge. The Court of Appeals for the Eleventh Circuit reversed. It rejected the novel historical argument of the district court and ruled that the teachers' religious activities violated the establishment clause in that they both advanced and encouraged religion.

The narrow question before the Supreme Court was whether the 1981 statute was constitutional. It had already affirmed the court of appeals holding that the 1982 legislation which authorized teachers to lead students in prayer was unconstitutional. Writing for the majority, Justice Stevens chided the district court for its "remarkable conclusion" that Alabama could establish a religion and not be in conflict with the federal Constitution. He added that "the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States."[63] He reminded the district court that when the Supreme Court incorporated the Bill of Rights into the fourteenth amendment, it imposed on the states the same limitations imposed on Congress.

Justice Stevens observed that the first amendment protects an individual in his right to speak as well as his right to refrain from speaking. Similarly, the right to choose one's own creed involves the right to refrain from accepting the creed established by the majority. It also includes the right to select any religious faith or none at all. Religious beliefs are the product of free and voluntary choice and are not to be imposed on an individual.

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[63] *Id.* at 48.

In applying the three-pronged test of *Lemon v. Kurtzman*[64] to this case, Justice Stevens noted that the 1981 legislation, sponsored by Senator Holmes, revealed clearly that it was his intention to restore voluntary prayer to the public schools. Whereas the 1978 legislation merely protected the right of any child to engage in voluntary prayer during a period of silent meditation, the 1981 legislation intended to endorse prayers at the opening of the school day, and this was a violation of the establishment clause.

Wallace actually broke no new constitutional ground. Instead, the justices relied on previous Court rulings. The case is interesting in that Justice Stevens was unusually acerbic in criticizing and rejecting the thinking of the district court which had attempted to rewrite settled, constitutional law.

Had the Alabama legislature not altered its 1978 statute, there may well have not been any litigation. The statute itself was neutral, for it allowed children an opportunity to meditate or reflect without the direction of teachers. Had students, of their own volition, wished to pray silently, they could have done so. It was when the state added prayer to the period of meditation that the statute became fraught with constitutional questions. This decision serves as a reminder to school personnel that they should be cautious about directing children in what should be included in a moment of silence. The content of that moment should be determined by the child. A period of silence, meditation, or reflection may be acceptable alternatives in the public school setting.

Five years before the *Wallace* decision, the Supreme Court held that posting the Ten Commandments in public school classrooms posed a conflict with the first amendment. *Stone v. Graham* (1980)[65] involved a challenge to a Kentucky statute which permitted the display of the Ten Commandments in every public school classroom, provided the cost of printing the documents was borne by private sources. The statute was challenged by persons from various religious backgrounds, including a Jewish rabbi and a Quaker, who charged that such displays violated their freedom of conscience and the first amendment. At trial, the statute was upheld and an equally divided state supreme court allowed the statute to stand.

On appeal to the U.S. Supreme Court, the justices in a *per curiam* opinion invalidated the statute. They ruled that the statute was in conflict with the *Lemon* test in that it had a sectarian legislative purpose. The fact that the state did not finance this activity was irrelevant; the effect of it was to "induce the school children to read, meditate upon, perhaps to venerate and obey, the Ten Commandments."[66] While some of the Commandments may be secular, others are patently religious and form a sacred text for some religious sects.

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[64] 403 U.S. 602 (1971). The three-pronged test is as follows: 1. Does the Act have a secular legislative purpose? 2. Does the Act have as its primary effect the advancement or inhibition of religion? 3. Does the Act excessively entangle government and religion?

[65] 449 U.S. 39 (1980).

Justice Rehnquist filed a dissenting opinion. He noted that secular purposes may sometimes overlap with religious objectives, but that does not necessarily render a statute unconstitutional. He added that the establishment clause "does not require that the public sector be insulated from all things which may have a religious significance or origin."[67]

The issue of religious clubs on campus was treated by the Supreme Court in two appeals. One case involved higher education; the other dealt with the secondary schools. In *Widmar v. Vincent*[68] college students at the University of Missouri at Kansas City sought to hold prayer meetings on campus. A registered student religious group, Cornerstone, which had previously received permission to hold such meetings, was advised that it could no longer do so because of a university regulation prohibiting the use of its buildings or grounds "for purposes of religious worship or religious teaching." Students then brought action in federal district court, charging an abridgement of their freedom of religion and speech. The district court ruled in favor of the university, but the court of appeals reversed on the basis that the establishment clause does not bar a policy of equal access in which facilities are open to groups and speakers of all kinds.

On appeal, the Supreme Court affirmed the holding of the court of appeals. Justice Powell stated that "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."[69] The university discriminated against student groups and speakers who wanted to use an open forum to engage in religious worship and discussion. The first amendment protects such a forum. Although the district court concluded and the university argued that such a forum would have the primary effect of advancing religion, both missed the point, according to Powell. Since the university opens its facilities for use by student groups, the question was whether it could exclude groups because of the content of their speech. Justice Powell saw that religious groups may benefit from access to university facilities, but those benefits would be incidental and not involve an advancement of religion. If the Constitution barred all benefits to religious groups, he wrote, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair."[70]

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[66] *Id.* at 42.

[67] *Id.* at 45.

[68] 454 U.S. 263 (1981).

[69] *Id.* at 267.

In *Bender v. Williamsport Area School District* (1986),[71] the legality of a Bible Club in a secondary school was challenged. Students in Williamsport, Pennsylvania, formed a club, "Petros," for the purpose of promoting "spiritual growth and positive attitudes in the lives of its members." They sought permission of the principal for the club to meet during the school's activity period. Initially, the principal granted permission but later withdrew it, with the agreement of the superintendent and on advice of legal counsel. The students appealed to the board of education, and its members denied the appeal. The district court ruled in favor of the students but granted no relief against any defendant. Although the school district did not appeal, one of its members, Youngman, did appeal. Justice Stevens noted that there was nothing in the record nor in the district court opinion which would suggest that relief was sought against any school board member in his individual capacity. The action against Youngman was in his official capacity only; therefore he had no standing to appeal in his individual capacity. As a result of this holding the Court left undecided what law applies to religious clubs in secondary schools.

In an issue unrelated to curriculum but having a significant bearing on a school district's educational program, the Supreme Court in *Lau v. Nichols* (1974)[72] ruled that Chinese students have the right to be taught in their native language. Acting in compliance with a state statute, the San Francisco School District required that English be taught as the primary language. However, several thousand children of Chinese ancestry did not speak the English language at all. The Court, speaking through Justice Douglas, ruled that these children were entitled to special instruction as guaranteed by section 601 of the Civil Rights Act of 1964 which, in conjunction with section 602, forbids discrimination when it has the effect of "defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin."[73] Although the Chinese parents sought relief under the equal protection clause, the Court based its decision on statutory rather than constitutional law.

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[70] *Id.* at 274 (citing Roemer v. Maryland, 426 U.S. 736, 747 (1976)).
[71] 106 S. Ct. 1326 (1986).
[72] 414 U.S. 563 (1974).
[73] 45 C.F.R.§803(b)(2) (1973).

In a case that has a bearing on the educational program of Amish children, the Supreme Court held in *Wisconsin v. Yoder* (1972)[74] that unique circumstances warrant the partial exemption of Amish children from a state's compulsory attendance law. While the Court upheld the legality of compulsory attendance laws in general, it ruled that the Amish could be exempt from them as they apply to the secondary schools. Chief Justice Burger, who wrote the majority opinion, saw the Amish as a unique sect. That sect has had a long history and tradition of being self sufficient and independent. Its members have demonstrated that their religious beliefs are sincere, and these beliefs have been woven into the fabric of their society. They prosper and have not been a burden to anyone nor to society.

The Supreme Court adopted the argument of the Amish that they did not object to formal schooling through the eighth grade. It also recognized that vocational schooling continues at home and on the farm after the eighth grade. The type and degree of education have not injured the Amish nor served the state badly.

By design, the Supreme Court opinion was a narrow one. The justices made it clear that their holding applied only to the Amish. Thus, if any group decided to organize, call itself a religious sect and seek to be exempt from laws such as this one, it would be unsuccessful. The difference between such a group and the Amish is the latter's history of realizing a successful lifestyle.

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[74] 406 U.S. 205 (1972).

CHAPTER FOUR

THE BURGER COURT ON RACE AND DESEGREGATION

4.0 Introduction

When Warren Burger became Chief Justice, the landmark *Brown v. Board of Education of Topeka*[1] decision was fifteen years old. Students not yet in kindergarten at the time of *Brown* had already graduated from high school when Burger became Chief Justice in 1969. During that decade and a half of the Warren Court, the justices were resolute in decisions compelling school boards to meet the mandate of *Brown*.

Over a period of fifteen years the Warren Court consistently handed down unanimous decisions in outlawing public school segregation. After its implementation decision in *Brown II*[2] the Court followed a predictable route by invariably holding that the right of black children to attend desegregated schools was not to be thwarted nor delayed by local school officials.[3] In adhering to this principle, the Court ruled that violence or the threat of violence was insufficient cause for delaying desegregation. It overturned transfer plans which operated primarily on race.[4] Ten years after *Brown*, the Court rejected a plan by Virginia which allowed a county to close its public schools and to operate a system of private schools.[5] It also revealed its dissatisfaction over the pace at which desegregation was occurring by declaring that the time for deliberate speed had run out.[6]

In spite of the justices' warning that the pace of desegregation was moving too slowly, the Court continued to hear public school desegregation appeals. It ruled in *Rogers v. Paul*[7] that desegregation at the rate of one grade per year was too slow. Three years later, in three separate opinions, it held that freedom of choice plans which did not accelerate the desegregation of the public schools could not be approved.[8] *Green v. County School Board*, the most important of these cases, involved two county schools, one black and one white. After a freedom of choice plan had been in operation for three years, no white child had elected to attend the black school, and approximately 85 percent of the black children still attended the black school.

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[1] 347 U.S. 483 (1954).

[2] Brown v. Board of Educ., 349 U.S. 294 (1955).

[3] *See* Cooper v. Aaron, 358 U.S. 1 (1958).

[4] *See* Goss v. Board of Educ., 373 U.S. 683 (1963); McNeese v. Board of Educ., 373 U.S. 668 (1963).

[5] Griffin v. County School Bd., 377 U.S. 218 (1964).

[6] *Id.* at 234.

[7] 382 U.S. 198 (1965).

[8] Green v. County School Bd., 391 U.S. 430 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968); and Monroe v. Board of Comm'rs, 391 U.S. 450 (1968).

The last public school desegregation decision of the Warren Court involved the legality of a plan to desegregate a school faculty in an Alabama school district.[9] Judge Frank Johnson had held in the district court that the ratio of white to black faculty should be substantially the same as it is throughout the system. The circuit court relaxed Judge Johnson's specific goal, and the Supreme Court overruled the appellate court, noting that although both lower courts were committed to desegregation, the question was to what degree. The Court decided to use the more stringent standard of the district court.

In its sixteen-year tenure, the Warren Court left no doubt of its resolve to desegregate the nation's public schools. Its opinions permitted an aggrieved black student to predict that there would be a sympathetic body in the Supreme Court. That stance set the stage for the Burger Court, with individuals guessing whether the pattern of consistent opinions would follow.

4.1 Key Decisions: The Momentum Begins

At the onset of the Burger Court, the justices ruled consistently with the Warren Court by taking a firm stand against segregation practices. Three relatively minor opinions during the first year and a half of the Burger Court revealed this. In *Alexander v. Holmes Board of Education*, a *per curiam* opinion, the Court stated that, "Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."[10] The Court rejected the three-month delay sanctioned by the Court of Appeals for the Fifth Circuit in desegregating some of the school districts in Mississippi.

In the same year the Court, in *Dowell v. Board of Education*,[11] approved the immediate change of attendance zones to promote desegregation, pending the formulation of a comprehensive desegregation plan.

In another *per curiam* opinion, *Carter v. West Feliciana Parish School Board*,[12] the Court ordered the immediate relocation of children in the middle of the school year, and this action was to be effected within eight weeks. The Court scolded the Fifth Circuit for delaying desegregation.

These three decisions at the beginning of the Burger Court had a great impact upon thousands of children who were to be moved during the school year into desegregated schools. The Court was convinced that fifteen years was too long for school boards to act with all deliberate speed. Although these opinions followed the pattern set by the Warren Court, they lacked precedential value to predict whether the pattern would continue. That test would come in 1971.

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[9] *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969).

[10] 396 U.S. 19, 20 (1969).

[11] 396 U.S. 269 (1969).

[12] 396 U.S. 290 (1970).

4.2 *Swann* Continues the Momentum

A busing decision in *Swann v. Charlotte-Mecklenburg Board of Education*[13] offered the first major desegregation test for the Burger Court. It was the first time that the Court had called into question the legality of court-imposed busing for the purpose of desegregating a dual school system. Not only did Chief Justice Burger write the opinion, but it was also a unanimous ruling. Burger wrote that court-ordered busing is an appropriate remedy for dismantling a dual school system.

This case attracted considerable attention for two reasons. One involved the question of how far courts may legitimately go in ordering desegregation. Some felt that in ordering busing, courts exceeded their power. The second reason involved the question of the leadership of the Chief Justice; whether he would lead — as had his predecessors — and push for further desegregation, or whether he would retreat. *Swann* provided him with the opportunity of asserting that segregation should be eliminated "root and branch." That opinion provided no clues of any departure from previous Court rulings.

Swann involved more than desegregation of one school system. It also involved the status of the neighborhood school, for larger busing plans could effectively destroy the concept of the neighborhood school. That in turn could upset established housing plans whereby people located, because of the reputation and convenience of nearby schools, according to comparable socio-economic strata.

Charlotte-Mecklenburg, North Carolina's largest school system in population, enrolled over 84,000 pupils in more than 100 schools. Its area covered 550 square miles. Its black population was concentrated largely in the northwestern quadrant of the city. Its student body was 71 percent white and 29 percent black.

The school district had operated largely on a 1965 plan that involved geographic zoning plus a few transfer provisions. In spite of the plan, the district remained largely segregated, so the district court imposed a desegregation plan. Judge McMillan noted that, based on *Green*, "The methods and philosophies which in good faith the School Board has followed are no longer adequate to complete the job which the Courts now say must be done now."[14] The school district was not in compliance with *Green*, McMillan reasoned, because 14,000 of the 24,000 black students still had no white teachers.

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[13] 402 U.S. 1 (1971).

McMillan adopted a plan whereby as many schools as possible throughout the system would reflect a 71 percent white and 29 percent black ratio. Such a plan would mean that an additional 13,300 children would be bused. This would involve the purchase of 138 new buses at a cost to the school district of $1,011,200. In addition, several outlying elementary schools would be grouped with each inner city school, requiring extreme busing.

The school district was able to accommodate the district court's order for desegregating the senior and junior high schools. However, it objected to that part of the order affecting the elementary schools. It saw two key problems, the busing of vast numbers of children and the financial burdens of purchasing a number of new school buses.

Speaking for a unanimous Court, Chief Justice Burger noted that, nationally, 39 percent of all public school children are bused. Busing had been used extensively in the Charlotte-Mecklenburg system for many years. Under the court-ordered plan, children would actually be on the buses no longer than educational authorities recommended.

Burger noted that where there had been no previous history of segregation, neighborhood schools might be best for children. But, he added, "All things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation."[15] He rejected the school board's contention that massive busing would be required to reflect the school district's racial mix of 71-29. Not only had the district bused for many years, but the Court saw that some bizarre or administratively awkward remedies might have to be imposed in order to eliminate segregation. Where there has been a constitutional violation, one then seeks an appropriate remedy, whatever form it may take. Since the location of new schools in the district had tended to perpetuate segregation, the nature of the remedy could not be limited to the neighborhood school. The school district had tended to build schools in the area where the white population had grown and, conversely, away from the black population. The Court questioned this practice, as well as the practice of selecting school sites in the midst of a black community and away from the white population.

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[14] 300 F. Supp. 1358, 1372 (W.D.N.C. 1969).

[15] *Swann*, 402 U.S. 1.

Having decided that the school district had to bus further to achieve a desegregated school system, the Court made some pronouncements that caused a degree of uncertainty. It held that in a racially unitary school district, not every school needs to reflect the racial composition of the school district as a whole. Further, in such a school system, a small number of one-race or virtually one-race schools is not forbidden. Finally, it held that, once a school district has desegregated, year-by-year adjustments are not required. What the Court did not do was give further meaning to these notions. It avoided requiring precise mathematical formulas but in doing so, it left open the question of when a school district is actually desegregated. The answer, presumably, is when a court declares that it is.

In spite of some nebulous pronouncements, *Swann* and its significance should not be underestimated. The opinion reflected the thinking of a resolute Court firm in its conviction that dual school systems must end.

4.3 Shifting Philosophies

After the *Swann* decision and three years into the tenure of the Burger Court, the Court membership changed and with that change, a schism began to appear in the justices' rulings.[16] For the first time in major desegregation cases since *Brown*, the justices were less than unanimous. In *Wright v. Council of Emporia*,[17] the Court divided 5-4 on whether the city of Emporia could create its own school district. The four dissenters included Chief Justice Burger and Justices Blackmun, Powell and Rehnquist, who happened to be the most recent appointees to the Court.

The five justices in the majority ruled that the city could not divorce itself from the county school system and operate its own, for the effect of that action would hinder the desegregation of Greenville County, within which Emporia is located.

Until 1967, Emporia was classified as a town, which under state law, meant that it was a part of the county system for purposes of public education. However, in 1967 Emporia became reclassified as a city, which meant that it was responsible for providing public education to children within its boundaries. The city then entered into an agreement with the county whereby the county would continue to educate Emporia's children, and Emporia would contribute financially to the county budget.

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[16] In 1972, both Justices Black and Harlan resigned from the Court and were replaced by Justices Powell and Rehnquist. Two years prior, Justice Blackmun was named to the Court to fill the year-long vacancy created by the resignation of Justice Fortas. Thus, as of 1972, Burger had three new associates on the Court since his ascendancy to it.

[17] 407 U.S. 451 (1972).

That plan worked satisfactorily until a federal district court ordered Greenville County to desegregate its schools by adopting a "pairing" plan. Following that court decree, the city decided to break away from the county system and establish its own school system. The majority of the city system's pupil enrollment would be black, and it would be a unitary district.

The Supreme Court invalidated Emporia's action. Speaking for the majority, Justice Stewart noted that the net effect of this action would be to impede the dismantling of the dual system in operation in the county. Stewart also saw that creation of the separate city system would tend to encourage white parents in the county to send their children to private schools. He noted that the city made no attempt to create its own school district until two weeks after the district court order.

With respect to the constitutional issue, the majority observed that the effect of its decision was not to prohibit Emporia from having its own school system. However, before this could be effected, one condition must prevail; there first had to be a desegregated school system in the county.

The four dissenters used a different rationale. Speaking through Chief Justice Burger, they asserted that there was no evidence that the creation of the Emporia school system was motivated by racial consideration. Unlike the majority who focused on the end result of the action, the dissenters argued that both the city and county school systems would be operating on a unitary basis; therefore, there was no conflict with *Brown* I and with the equal protection clause. They also asserted that the majority lacked sufficient cause to prevent a city from operating its own school system.

On the same day that the Court ruled in *Emporia*, it handed down a second decision involving public school desegregation. In *United States v. Scotland Neck City Board of Education*,[18] the Supreme Court was in agreement when it ruled that Scotland Neck, an eastern North Carolina town of 3,000 in Halifax County, could not create its own school district. Had Scotland Neck been allowed to do so, the effect would have been to create a majority school system of white students, whereas the county system would be overwhelmingly black.

In 1968, the county was ordered to desegregate. As a consequence of that order, legislation was introduced in the General Assembly for the creation of the Scotland Neck school district, separate from that of the county system. The legislature then had the bill submitted to a referendum which the voters of the town approved.

The Supreme Court looked again at the result of the action and not at the purpose. The newly created school district would have a black student population of 43 percent, while the county system's black student population would be 89 percent. The Court rejected the thinking of the Fourth Circuit which had upheld the plan, noting that it had been the product of state legislation and not that of a local school board. To the Supreme Court, that fact bore no constitutional significance.

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[18] 407 U.S. 484 (1972).

The key criterion that the Supreme Court used was whether any redistricting would deter or promote the process of desegregation which had already begun. In both *Wright* and *Scotland Neck*, the Court saw that the creation of the two new school districts would not meet that criterion. Taken together, these two cases cannot be considered as landmark decisions. While they do stand for the proposition that invidious schemes to thwart the holding or the spirit of *Brown* would not be sanctioned by the Supreme Court, *Wright* served as a signal that the Court's near-impenetrable armor of unanimity was cracking and only time and subsequent court decisions would determine whether those cracks would become wider and deeper.

4.4 Big City Desegregation

Two decades after *Brown*, litigation over public school desegregation shifted. Whereas for twenty years the focus had been on southern school districts and de jure segregation, it now began to shift to other regions of the nation and to de facto segregation.

Brown and its progeny focused on de jure segregation, that which is grounded in governmental action. Its source may be a constitutional provision, statutes, or school board policy, but regardless of that source, it represents official governmental action which is inconsistent with equal protection. By contrast, de facto segregation does not result from official governmental action. Instead, it results from an inclination of people to choose their housing independent of any constitutional provision, statute, or board policy. The end result of these two types of segregation may be the same — people segregated by race in a given community — but the source and cause of that segregation differ.

In *Brown*, the issue was de jure segregation. A total of twenty-one of the then 48 states in 1954 were found to be operating school systems in which segregation was governmentally sanctioned. But *Brown* did not address some of the enclaves of minorities in central cities of regions outside the South. School officials in the nonsouthern areas defended segregation by pointing out that it was not purposeful, it was not subject to their control, and they were without authority to correct it. As a result, they merely tended to locate school buildings in attendance districts that best served neighborhoods.

Some people argued that segregation, whatever its source, was illegal. The source of it was not a critical factor but the end result was. De facto segregation still denied to black children the opportunity to attend school with white children. While *Swann* did not treat this issue directly, the Court did tip its hand in ordering busing. The effect was the erasure of traditional attendance zones and the modification of the concept of the neighborhood school.

Against that backdrop, it was merely a question of time before the Supreme Court would hear a case directly involving the legality of de facto segregation. Court observers were divided; there were those who wanted all distinctions between de jure and de facto segregation erased, and there were others who favored a limitation of a court ruling to cases involving explicit or purposeful segregation. In *Keyes v. School District No. 1*,[19] the Court indicated that it was not yet ready to declare that there is no legal difference in the two forms of segregation. In fact, the justices stopped short of announcing any sweeping desegregation edict. Instead, they sent the case back to the district court for additional findings. Nonetheless, the decision was not to be treated lightly, for it served as a warning to northern school systems that school board action can intentionally or unintentionally promote segregation.

Keyes involved the Denver, Colorado school system. It spawned a rash of court opinions at the lower federal courts, but the key question throughout the prolonged litigation was whether the school board had been operating two forms of segregation; de jure in the predominantly white northeastern section of the city, or de facto in the core city area. When litigation began in 1969, the school population was 66 percent white, 14 percent black, and 20 percent Hispanic.

During the school year 1968-69, the school board stated its commitment to the neighborhood school concept but adopted resolutions designed to desegregate the northeastern section of the city by providing that boundary lines would be drawn to provide for approximately 20 percent black students in each school. After a subsequent school board election, a majority of the newly-elected members opposed the resolutions. These resolutions were, in turn, rescinded and replaced with a voluntary student transfer program between the elementary schools of the northeast and other elementary schools of the district.

The district court ordered the desegregation of schools in the northeast sector. Plaintiffs then asked the court to order the desegregation of all schools in the city, particularly those in the core area. The court observed that a finding of purposeful segregation in one area did not impose an affirmative duty to eliminate segregation throughout the district. Instead, the plaintiffs should make a different claim of de jure segregation in each area of the city in which they sought relief. That is, the court recognized that the northeast had de jure segregation; the core city had de facto.

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[19] 413 U.S. 189 (1973).

In a subsequent order, the district court found that the core city schools were educationally inferior to the predominantly white schools in other parts of the city and decided that the only remedy should be compensatory education in an integrated environment.

On appeal, the Court of Appeals for the Tenth Circuit affirmed in part and reversed in part. The judges affirmed that the school board had engaged in deliberate segregation in the northeast; they reversed the holding that the core city schools had unequal educational opportunity. This latter holding formed the basis of appeal to the Supreme Court.

The Supreme Court's holding reflected a lack of unanimity, for no less than five separate opinions were written by the eight justices (Justice White did not participate). Justice Brennan wrote the majority opinion in which Justices Douglas, Stewart, Marshall, and Blackmun joined. Justice Douglas wrote a separate opinion in which Chief Justice Burger concurred in the result. Justice Powell concurred in part and dissented in part. Justice Rehnquist dissented. There was thus no voting cleavage of the most recent appointees as reflected in *Emporia* one year earlier.

The justices in the majority did not hold that segregation was segregation, whether it be de facto or de jure. Justices Douglas and Powell rejected that notion, and Powell declared that "In my view we should abandon a distinction which long has outlived its time, and formulate constitutional principles of national rather than merely regional application."[20] Brennan's majority holding was that "The differentiating factor between de jure segregation and so-called de facto segregation . . . is *purpose* or *intent* to segregate."[21]

The majority ruled that a segregated school system is one not bound by a rigid mathematical ratio. Instead, it depends on the facts of each particular case, and some guidelines include student, faculty, and staff composition, the community, and administrative attitudes. The Court ruled that a segregated school in Denver is one that has a majority of blacks and Hispanics; it noted that the district court erred in separating blacks and Hispanics for the purpose of defining a segregated school.

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[20] *Id.* at 219.

[21] *Id.* at 208. Emphasis in original.

Where a school board has engaged in segregation in part of a city, the entire city becomes suspect. The Denver school board had engaged in the following questionable practices:

1. concentrating blacks in certain schools which had the effect of keeping other schools white;
2. building a school a certain size and in a certain location with the knowledge that it would be segregated and thus affect the racial composition of other schools;
3. providing mobile classrooms to avoid desegregation;
4. approving student transfer policies;
5. transporting students; and
6. assigning faculty and staff.

The Supreme Court remanded the case to the district court with orders for the school district to prove that the segregation in the northeast was not the product of any board action. Should the school board be unable to do this, the district court would then determine if the school system was a dual one, in which case the entire system was to be desegregated. If it was not a dual system, the school board was to be given the opportunity to rebut the charge of intentional segregation in the core city. Should the board be unable to do this, the district court was to order all-out desegregation of those schools.

Although the Supreme Court issued neither broad sweeping pronouncements nor any general principles, it did suggest to school officials that they have several alternatives for addressing a segregation problem and that their best choice would be that which contributes most to desegregation. The Court iterated that there was no universal definition of what constitutes a desegregated school system or a desegregated school. One indicator of a desegregated school was the satisfaction of minority parents that their children are appropriately placed. The concentration of minorities in given sections of larger cities should prompt board members to explore various ways of desegregating the schools in advance of court edicts.

From Denver the desegregation movement before the Supreme Court shifted briefly to Richmond, Virginia. There, the city schools at the onset of the 1970s were 65 percent black. Various individuals testified that a desegregation plan involving the city only would not result in a stable integrated community nor produce the results mandated by *Brown*. The federal district court agreed, and in a lengthy opinion, ordered that the city schools be merged with the two surrounding counties of Henrico and Chesterfield.[22] This order was revolutionary if for no other reason than it was the first time a federal judge had merged school systems for the purpose of achieving desegregation. Judge Merhige observed that, "School district lines within a state are a matter of political convenience. The claim that the defendant counties have a right to keep their separate systems to be utilized solely by residents of the respective counties has little merit in the fact of past discrimination practices on the part of all the defendants."[23] Merhige believed consolidation was a reasonable step toward eliminating the effects of past discrimination.

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[22] *Bradley v. School Bd.*, 338 F. Supp. 67 (E.D. Va. 1972).

After the court of appeals reversed, holding that Judge Merhige lacked authority to order such a merger, an equally divided Supreme Court affirmed the decision of the court of appeals.[24] Justice Powell did not participate in this decision, since he had formerly served on the school board of the Richmond City Schools.

After Richmond, the focus of the desegregation movement shifted to Detroit. In *Milliken v. Bradley*, the Supreme Court ruled 5-4 that the Detroit City Schools could not be required to merge with suburban school districts.[25] The justices issued five separate opinions. The four dissenters in *Emporia* — the newest members of the Court — joined with Justice Stewart in holding that the fourteenth amendment does not require the merger of school districts for the purpose of effecting an equitable racial balance.

The decision is significant for a number of reasons. It is further evidence of a growing and identifiable philosophical division among the justices with respect to the segregation issue. It also revealed the notion that there are limits within which courts can operate in ordering desegregation.

The City of Detroit had been in the courts since 1970, when the local board of education enacted a desegregation plan. Scheduled to be implemented that fall, the plan provided for changes in attendance zones which would bring about a better racial balance in twelve of the twenty-one high schools. The plan would take effect over a three-year period, beginning with students in the tenth grade. Complainants objected to the progress of desegregation, but they directed their attack, not on the school board plan, but rather on a statute. The state had enacted a law in 1970, which had the effect of delaying desegregation in first-class school districts. However, since the Detroit school system was the only one in the state so classified, the act pertained only to it. It provided that desegregation in Detroit should be delayed pending the reorganization of the system into eight districts, each with a school board.

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[23] *Id.* at 104.

[24] *Bradley v. School Bd.*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973).

[25] 418 U.S. 717 (1974).

In attacking the statute, complainants alleged that it interfered with the school board plan to desegregate the schools. What resulted was a series of court actions involving both the district and circuit courts. In 1970, the Court of Appeals for the Sixth Circuit held the statute to be unconstitutional. The court saw that the legislature had thwarted the local board of education in its efforts to effect a racial balance in twelve of the twenty-one senior high schools.

In 1971, a first attempt was made to add school districts as defendants to the case. The next year the district court established tentative boundaries for a metropolitan remedy for desegregation and appointed a panel of nine members to design plans for integration of Detroit with fifty-three metropolitan school districts.

In 1973, the circuit court ruled on the legality of the metropolitan plan. In upholding the plan for merger of the suburban school districts with the Detroit schools, the court observed:

> It is inescapable that relief of segregation in the public schools in the city of Detroit cannot be accomplished within the corporate geographical limits of the city.... We see no validity to an argument which asserts that the constitutional right to equality before the law is hemmed in by the boundaries of a school district.[26]

Following this order to desegregate, the case was appealed to the Supreme Court. The Court majority stated at the outset that it sought to eliminate a dual school system. The remediation hinged on balancing "the individual and collective interests with the condition that offends the Constitution."[27] That is, the basis of the violation would determine the remedy. It was on this key legal point that the justices divided, and that signaled a retreat from the Court's consistent holdings in ordering desegregation.

The majority relied on *Swann* and reaffirmed the standard that desegregation does not require any particular racial balance in each school, grade, or classroom. But, unlike *Milliken*, *Swann* treated only one school system. These five justices rejected the district court's holding that school district lines exist merely for political convenience:

> Boundary lines may be bridged where there has been a constitutional violation for inter-district relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control in the operation of schools....[28]

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[26] *Milliken v. Bradley*, 484 F.2d 215, 244 (6th Cir. 1973).

[27] *Milliken*, 418 U.S. 717, 738.

[28] *Id.* at 741.

The majority envisioned a number of problems arising from the consolidation of so many districts, none of which had been treated by the lower courts. They included:

1. the matter of who would levy taxes;
2. the status and authority of presently-elected school boards;
3. the determination of an equitable tax rate;
4. the validity of long-range bonds;
5. the determination of curriculum; and
6. the status and resolution of attendance zones, purchases, and construction.

These justices saw the logical extension of the lower court's holdings as creating a school board out of the judiciary which would dilute lay control over schools. They then considered the crux of the issue in this case, i.e., that "there has been a constitutional violation within one district that produces a significant segregation effect on another district."[29] The effect of this standard would mean showing that the suburban school districts had caused or contributed to segregation within the schools of Detroit. An inter-district remedy would also be appropriate where school district lines had been deliberately drawn on the basis of race. But, "without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy."[30]

The Court found evidence of de jure segregation in Detroit. There was no showing, however, of segregation being caused by the suburban school districts. To date, there had been no court opinions involving the merger of school districts to effect desegregation, and the justices were unwilling to change that stance. To do otherwise would be to penalize those not engaged in any constitutional violation.

The majority then refuted four basic contentions of the court of appeals which had identified unconstitutional state action:

1. *The state is responsible for Detroit's segregation*. This notion was premised on the ground that the Detroit school board is an agent of the state. In rejecting this notion, the Court held that, even if the assumption were correct, a cross-district remedy was not the solution. The school district and city lines, established a century ago, are coterminous, and neither was established to operate a racial system. Further, the suburban districts have unitary systems.

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[29] *Id.* at 745.

[30] *Id.*

2. *Busing had been used to avoid desegregation.* Evidence showed that in the 1950s a predominantly black school district, Carver, contracted to send black pupils to a predominantly black high school in Detroit. The state board of education approved this plan. The Supreme Court saw this as being an isolated incident and not an indication of overt discrimination.
3. *The state was involved through its construction program.* In spite of the fact that it oversaw site acquisition, there was no evidence that selection of sites had resulted in de jure segregation within Detroit or that it had affected segregation outside Detroit.
4. *The state aid formula was inequitable.* The formula allowed suburban school districts to have larger per-pupil expenditures with less tax effort than the Detroit system. The Court responded by stating there was no evidence that this had affected the racial character of the school districts.

In a concurring opinion, Justice Stewart stated that school officials had contributed to racial segregation by improper zoning, attendance patterns, optional attendance areas, and building and site selections. To him, the problem was one of an equitable solution, but since the violation did not extend beyond the Detroit lines, neither could the remedy.

Justices Douglas, White, and Marshall each wrote dissents. Douglas would have placed greater responsibility on the state. He saw the problem as extending beyond Detroit and would have included the metropolitan areas in its resolution. White would also have involved the state to a greater degree:

> An interdistrict remedy for the infringements that occurred in this case is well within the confines and powers of the State, which is the governmental entity ultimately responsible for desegregating its schools.[31]

He stated further:

> The Court draws the remedial line at the Detroit School District boundary, even though the Fourteenth Amendment is addressed to the State and even though the State denies equal protection of the laws when its public agencies, acting in its behalf, invidiously discriminate.... I cannot understand, nor does the majority satisfactorily explain, why a federal court may not order an appropriate interdistrict remedy, if this is necessary or more effective to accomplish this constitutionally mandated task.[32]

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[31] *Id.* at 770.
[32] *Id.* at 771.

White also wrote that state officials are answerable for unlawfully caused conditions of school segregation that can effectively be controlled only by authority beyond the local school district.

The third dissenter, Justice Marshall, accused the majority of taking a giant step backward. He held that where segregation has been state-imposed, it becomes the duty of the state to eliminate it. He saw that a remedy limited to the Detroit schools would be ineffective. Finally, he believed that the majority was making a serious mistake by retreating from the Court's consistent record of guaranteeing equal justice to blacks, and he regretted seeing a metropolitan area divided into areas, one black and one white.

What the Court did in *Milliken* was to decide that school desegregation stops just short of a school district line. The fourteenth amendment does not compel courts to order that school districts be merged to effect a racial balance. To require otherwise, one or two factors must exist. School district lines must have been deliberately drawn to separate the races or there must be evidence that discriminatory acts in one district produced segregation in another district.

The Court's majority position reflected a peculiar notion about the relationship of school districts to the state. The majority held that a state is not necessarily accountable for the actions of one of its local agencies, the school district. That position runs counter to the basic premise in education law which holds that, when a school district acts, it is in the name of the state, or is, in effect, the state itself. The Court could have avoided taking such a position and yet rendered the same decision.

Milliken was seen as slowing down desegregation in both the North and the South. It was not seen, however, as slowing down desegregation within a city. The city school system proceeded with desegregation and, three years later, before the Supreme Court again, the justices held that the state could be required to provide the district with supplementary services designed to enrich the curriculum of the children in the city schools.[33] These services included compensatory programs in reading, testing, in-service teacher training, and counseling and career guidance for the core city children who had previously suffered from the effects of segregation.

In the mid-1970s, the Burger Court continued its stance of retreating from bold desegregation orders. In *Pasadena City Board of Education v. Spangler*,[34] it ruled that, once a school district has adopted a unitary school system, annual readjustments of attendance zones are not required. Earlier, a district judge had approved a plan which required that there be no school in the district whose population was more than 50 percent minority students. The judge interpreted that part of the plan as requiring annual adjustments to insure that the school population be consistent with the plan.

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[33] *Milliken v. Bradley*, 433 U.S. 267 (1977).

[34] 427 U.S. 424 (1976).

The school board adjusted its attendance areas and was in compliance. However, a number of people in the school district changed their residences, and the racial balance within the school system became unbalanced. The school board was then forced to decide whether annual adjustment of attendance zones was required. With Justices Marshall and Brennan dissenting, the Supreme Court ruled that such realignments were not required. Relying on *Swann*, the majority recognized that there are limits on the judicial power to direct the change from a dual to a unitary school system. The majority saw that resegregation could occur through the random movement of people without any governmental action.

Marshall, in dissent, joined by Brennan, argued that the Pasadena schools had never been fully desegregated. He cited specifically the uncooperative attitude of local school officials and lack of evidence in hiring and placement of faculty.

The next city in which segregation was an issue before the Supreme Court was Dayton, Ohio. Although the state had abolished school segregation in 1887, the district court found that de jure segregation existed both before and after *Brown*. The circuit court agreed but considered the district court's remedy to be inadequate. It remanded the case to the district court for a plan consistent with *Keyes* and *Swann*. The district court ordered both plaintiffs and defendants to submit plans. Upon submission, the court approved only the school district's plan. It involved, among other things, allowing an all black school, creating a magnet school downtown, establishing a new vocational high school with a balanced racial population, creating three magnet elementary schools, and developing one magnet alternative middle school. The district court added some provisions to the plan. It required that faculty be balanced racially in all programs, and special programs were to be located to create no undue transportation burden on either race. A key requirement by the court was that all classes were to be within 15 percent of the school population mean.

The Court of Appeals for the Sixth Circuit held that the plan did not conform to the constitutional mandate. It noted that some progress in desegregation had been made, but not enough to satisfy the Constitution. It remanded the case, including specific and general orders. The general order was for the district to adopt a system-wide plan consistent with *Keyes* and *Swann*.

Speaking through Justice Rehnquist, the Court ruled in *Dayton Board of Education v. Brinkman*[35] that a district-wide desegregation plan was not required. Rehnquist stated that the actual existence of segregation was not so critical as the source of it. Since there was no evidence of the school board's intent to segregate, there was no compelling reason for ordering the board to remedy the segregation. Although a number of the schools in the district were predominantly white or predominantly black, that fact, in and of itself, did not offend the Constitution. The Court left undisturbed the comprehensive desegregation plan in operation, which would be reviewed after the 1977-78 school year.

Had the circuit court desegregation order been upheld, it would have required the transportation of approximately 15,000 pupils. The Supreme Court held that this amount of busing exceeded what was required to remedy vestiges of discrimination. In other words, city-wide busing was not required.

On reconsideration after the 1977-78 school year, the district court upheld the desegregation plan, but the court of appeals reversed. The latter ruled that the school district was operating a dual school system and the remedy called for system-wide desegregation.

Before the Supreme Court a second time, *Dayton Board of Education v. Brinkman*,[36] the justices voted 5-4 to uphold the decision of the court of appeals. Since segregation in the school system had resulted, in part, from school officials' acts, those officials must assume greater responsibility. It was insufficient for the officials to take no action; rather, they must undertake affirmative action for ridding a school of segregation practices. Since segregation was found to be system-wide, the appropriate remedy was system-wide desegregation.

The dissenting justices filed three opinions. Justice Stewart, joined by Chief Justice Burger, took the position that there was lack of evidence of recent acts of segregation by the school board. Justice Powell called for less interference by the federal courts in the operation of schools, and Justice Rehnquist, joined by Justice Powell, noted that the majority removed any distinctions between de jure and de facto segregation.

In the same year as *Dayton II*, the Supreme Court acted on alleged segregation in another Ohio case, *Columbus Board of Education v. Penick*.[37] Columbus was found to have been a segregated school system at the time of *Brown* in that the school board had gerrymandered attendance zones.

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[35] 433 U.S. 406 (1977).
[36] 443 U.S. 526 (1979).
[37] 443 U.S. 449 (1979).

Over two decades after *Brown*, the school board had knowingly continued segregation practices. In fact, it had taken no affirmative action to dismantle the dual system. At the time of the litigation, over two-thirds of the students attended schools of predominantly one race. Both the district and circuit courts ruled that the district was not desegregated. The district court ordered a district-wide remedy and the circuit court upheld it. With Justices Rehnquist and Powell dissenting, the Supreme Court upheld the court of appeals. Rehnquist and Powell argued that the school district was being held to a remote past which bore little resemblance to the present racial mix in the schools.

The Supreme Court's majority, speaking through Justice White, confirmed that the justices were not retreating from ordering substantial busing to effect a desegregated system. It also revealed that the Court was not reluctant to abandon its *Keyes* standard of requiring a district-wide remedy for correcting segregation in only one section of the city. Once deliberate segregation was found to exist in one part of the school system, the Court concluded that the entire system was a dual one. Even though there had been no statutory or constitutional requirement that the schools be segregated, that was, in fact, the case, and school officials had been remiss in not taking steps to correct it. The Court ruled, "Proof of purposeful or effective maintenance of a body of separate black schools in a substantial part of the system itself is prima facie proof of a dual school system and supports a finding to this effect absent sufficient contrary proof by the Board, which was not forthcoming in the case."[38]

Three years after *Penick*, the Burger Court handed down the last of its big-city desegregation opinions. Two decisions, one originating in Seattle and the other in Los Angeles, focused on the legality of state-approved referenda that had the effect of limiting desegregation plans. The Supreme Court rejected the Seattle plan and upheld the one for Los Angeles.

In *Washington v. Seattle School District No.1*,[39] racially segregated housing patterns resulted in racial imbalance in a number of the district's 112 public schools. In response to this situation the school board voluntarily devised a plan designed to eliminate many of the neighborhood schools. The plan included pairing of white and minority attendance areas, busing, and mandatory reassignment of many students to different schools. A number of people in Seattle viewed these plans as going substantially beyond what the Constitution required. Their concern grew with the formation of a group called CIVIC which was successful in placing an initiative on the statewide ballot for the November election. The initiative sought approval of a bill which had the effect of preserving the neighborhood school. The bill provided that no school board could require a student to attend a school other than one of the two nearest his residence that offered a given course of study or employed any of seven methods of indirect student assignment, including redefining attendance zones and pairing schools. A student could bypass a neighborhood school only if he required special education, if there were health hazards, or if the nearby school was overcrowded, unsafe, or lacked physical facilities.

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[38] *Id.* at 458, citing *Keyes*, 413 U.S. 189, 203.

[39] 458 U.S. 457 (1982).

The voters approved the initiative. Following its approval, the school board sought to declare the measure as being unconstitutional. The trial and appellate courts ruled in favor of the school board, and the Supreme Court affirmed. It found that the initiative was designed to serve racial purposes. It interfered with busing for purposes of desegregation in that it allowed school districts to bus students for reasons that did not agree with *Brown*. Blackmun's majority opinion noted that the state had chosen an elaborate system for making decisions regarding education and pupil assignment, whereas, it could have reserved that system for itself. Nonetheless, the state must operate its schools within the constraints of the fourteenth amendment.

The Los Angeles plan fared better in court than did the Seattle plan. In *Crawford v. Board of Education*,[40] the Supreme Court ruled 8-1 that a referendum limiting busing for purposes of achieving a better racial balance did not violate the equal protection clause. Unlike the Seattle plan, the Los Angeles plan was not drawn up for racial purposes, even though an organization opposed to the desegregation plan helped get a referendum on the state ballot. That referendum had the effect of limiting the power of state courts to order busing to no more than what would be ordered by federal courts under the fourteenth amendment.

The racial composition of Los Angeles was 23.7 percent white, 23.3 percent black, 45.3 percent Hispanic, and 7.7 percent Asian and other. Its 562 schools with 650,000 students served an area of 711 square miles. Under a state order to desegregate, the school board adopted a plan eliminating many neighborhood schools and requiring mandatory reassignment of approximately 40,000 students in grades 4-8, including busing of some students which took from two to four hours daily.

Through BUSTOP, opponents of the desegregation plan got an initiative on the November ballot, and 69 percent of the voters approved it. The Los Angeles school board then asked the state court to dissolve its desegregation order and stop all mandatory reassignment and busing of students. That court refused, but the appellate court reversed and held that the proposition was constitutional. On appeal to the Supreme Court, and with only Justice Marshall dissenting, the justices upheld the legality of the proposition. The Court could not impute a discriminatory motive to the more than two-thirds majority of the people who voted for the initiative. It rejected the notion that once a state elects to go beyond the requirements of the fourteenth amendment, it may never reconsider the policy. Such a notion interferes with the democratic process and a state's right to experiment.

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[40] 458 U.S. 527 (1982).

4.5 Nonpublic Schools

Racial desegregation in nonpublic schools has not received the attention of the courts that public school desegregation has. This is because, for the most part, nonpublic schools are not subject to the fourteenth amendment. That amendment places restrictions on governmental action, but it does not restrict nongovernmental action, including private schools. It is only when a connection can be shown between a private school and the state that the school may be subject to the equal protection clause of the fourteenth amendment. Once that showing has been made, the private school is not viewed as being a fully private school and may be ordered to admit students from a minority race.

Under the Warren Court, the justices decided shortly after *Brown I* that a private school is not really private. In *Pennsylvania v. Board of Directors*,[41] Girard College was ruled to be subject to state action. Girard, although named a college, was in actuality a private school for "poor white male orphans," as provided for in the will of Stephen Girard, a wealthy businessman of the early 1800s. The school enrolled boys between the ages of six and ten and educated them until they reached age eighteen and graduated from high school. In addition to the regular curriculum, the school offered instruction in trade skills.

The school opened in Philadelphia in 1848. The city managed the operation of the school until 1869, at which time the job was turned over to the Board of Directors of City Trustees whose members were made agents of the city.

The school's student population was entirely white male, and there were no challenges to that status until 1954, when two black students applied. These two students met all qualifications for admission except race. In the suit which followed, the plaintiffs charged that their exclusion was in violation of the fourteenth amendment.

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[41] 353 U.S. 230 (1957).

The Supreme Court of the United States disposed of the case in a brief *per curiam* opinion. Significantly, this was the first school desegregation opinion of the Court after *Brown II*. The justices made it clear that the two *Brown* opinions were meant to be followed. They held that, since the Board of Directors was chosen by the City of Philadelphia, state action was involved, and Girard was consequently subject to the fourteenth amendment. It ordered that the two boys be admitted. The effect of the decision was that Girard changed the method of selecting its directors, an action that stalled desegregation for a decade. Finally, black students were admitted in the fall of 1968.

Pennsylvania v. Board of Directors cannot be considered as being a landmark decision, but it is nevertheless important. It signaled that the Supreme Court was willing to assume the initiative in striving for desegregation and that it was ready to expand the interpretation of the application of the equal protection clause to further that objective.

In many places in the South, the response to the *Brown* decision was to establish a number of private schools. These schools were typically located in communities in which there was strong opposition to *Brown* and subsequent opinions. Often, these schools had a very small student enrollment and teaching staff, limited curriculum, and few extracurricular activities. They were subject to state licensing and some limited state supervision. It was not unusual for parents of children attending these private schools to state openly why they chose this type of education.

It is surprising that there has been so little litigation before the Supreme Court on the segregation of private schools. After *Pennsylvania v. Board of Directors*, the most direct test came from Montgomery, Alabama. Acting under a court order, the city desegregated its public parks. However, it worked with the local YMCA so that segregated recreational programs would still be offered. In *Gilmore v. City of Montgomery*[42] the Supreme Court ruled that segregated private schools may not have exclusive access to public recreational facilities for athletic events and other functions. The effect of that decision was to deny to private segregated schools access to facilities which they would otherwise provide for students' use. For example, a private school would not be allowed to use a gymnasium for basketball practice and games, for that would have constituted exclusive use. On the other hand, private school students would be allowed to use some, but not all of the tennis courts. A private school's swimming team could not be granted official use of a swimming pool but individual private school students could use the pool along with other children in the city.

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[42] 417 U.S. 556 (1974).

The Court did not answer the question of whether the city could allow private school groups to use public facilities for an official school function on a nonexclusive basis. That is, could a fourth grade class take a nature hike through a park for the purpose of identifying plants or animals? The justices disagreed on whether the question had been properly presented to them and thus left it unanswered.

Two years after *Gilmore*, the Supreme Court ruled more directly on the constitutionality of segregation in private schools. It held in *Runyon v. McCrary*[43] that a commercially operated, nonsectarian private school discriminated against blacks in admission. The school advertised in the yellow pages and used bulk mailings in its recruitment of students. Two black children applied and were rejected solely on the basis of race, after which they brought charges of discrimination.

The Supreme Court reasoned step by step that black children could not be denied admission because of their race. In step one, the Court observed that the thirteenth amendment forbids slavery. Further, the federal government shall enforce that measure by appropriate legislation, which included 42 U.S.C section 1981. In step two, the Court noted that section 1981 provides in part that all persons have the same right in every state to make and enforce contracts. That statute prohibits private acts of racial discrimination in the offering of contracts to the public, namely, contracts for employment or education. Since minorities had the right to enter into contracts, denying them admission to the school on the basis of race was illegal. State action became involved at the point that the state exercised some control over these schools in assuring compliance with constitutional and statutory regulations.

In the third nonpublic school case before the Burger Court, the justices ruled in *Bob Jones University v. United States* and its companion case *Goldsboro Christian Schools, Inc. v. United States*[44] that private schools which discriminate in admission practices and in student life may not enjoy a tax-exempt status.

Goldsboro Christian Schools, incorporated in 1963, offered classes from kindergarten through high school. It required students to take Bible-related courses and to begin each class with prayer. Since 1963, it had maintained a racially discriminatory admissions policy based on its interpretation of the Bible. Although it accepted primarily Caucasians, it enrolled children from racially mixed marriages if one of the parents was Caucasian.

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[43] 427 U.S. 160 (1976).

[44] 461 U.S. 574 (1983).

Bob Jones University operated a school from kindergarten through college and graduate school. Although the school was not affiliated with any religious denomination, it was dedicated to the teaching of fundamentalist Christian religious beliefs. It required that its teachers be Christian, and student applicants were screened regarding their religious beliefs. Further, student conduct was regulated by University standards.

University officials believed that the Bible forbids interracial dating and marriage. Until 1971, the University excluded all blacks. From 1971-75, it accepted no unmarried blacks, but since then it has permitted unmarried blacks to enroll. It forbids interracial dating and marriage.

The 1983 case resulted from action taken by the Internal Revenue Service. The Internal Revenue Code provides that corporations organized and operated exclusively for religious, charitable, or educational purposes are entitled to tax exemption. Until 1970, the IRS granted tax exempt status to private schools regardless of their racial admissions policies. However, a 1971 ruling provided that a private school not having a racially nondiscriminatory policy towards students was not charitable. Thus, the IRS revoked the tax exempt status of Bob Jones University and Goldsboro Christian Schools.

With only Justice Rehnquist dissenting, the Supreme Court upheld the IRS action. Speaking for the majority, Chief Justice Burger noted that it had been the public policy of government since *Brown* that racial discrimination be eliminated. Discrimination violated deeply and widely accepted views of elementary justice. He added that "Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the 'charitable' concept...."[45] Burger noted that the IRS ruling intended to grant tax exemptions only to those organizations maintaining a public purpose consistent with public policy.

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[45] *Id.* at 595.

CHAPTER FIVE

THE BURGER COURT ON SCHOOL FINANCE ISSUES

5.0 Introduction

In the late 1960s, litigation began to appear in the federal district courts attacking state public school financing systems. In what has been characterized as a battle between the "haves" and the "have nots," plaintiffs argued that state educational finance formulas, mainly based upon local property tax revenues, discriminated unfairly between classes of children on the basis of "wealth." Free access to an equal educational opportunity, they said, was conditioned by "accident of birth."

As Sparkman described the decade of the 1970s:

> [O]ver one-half of the fifty states were involved in some form of legal challenge to their school finance systems.... The highest courts in California, New Jersey, Connecticut, and Washington found the state school finance plans in violation of their state constitutions. Meanwhile, the highest courts in eight states found that their respective school finance plans were constitutionally sufficient. In three states, challenges were made to a recapture provision in the states' school finance schemes so the legality of the entire system was not an issue.[1]

During the 1971-72 school year, primarily because of the confusion caused by lower court decisions, the Burger Court broke with tradition and began to take public school finance cases from various states. And, as the decade moved forward, the school finance litigation coming before the Court expanded to include issues of public aid to private schools and colleges, as well as tuition reimbursements, tax credits, and deductions for parents.

5.1 Equal Protection and Equal Access Issues

In 1968, a three-judge federal district court in Illinois ruled against plaintiffs in a class action suit challenging that state's public school finance scheme. Parents of public elementary and secondary school students in four school districts located in Cook County had claimed that state statutes permitted a wide variation of expenditures per student in violation

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1. W.E. Sparkman, *School Finance Litigation in the 1980s*, in EDUCATORS AND THE LAW: CURRENT TRENDS AND ISSUES at 96-97 (S.B. Thomas, N.H. Cambron-McCabe & M.M. McCarthy, 1983).

of fourteenth amendment equal protection. Finding an absence of any invidious discrimination, the federal court saw the existing financial inequity as "an inevitable consequence of decentralization."[2]

That same year, in a case out of Virginia, another three-judge federal district court dismissed a similar class action. This case was initiated by parents who claimed that their children were being denied educational opportunities equal to those enjoyed by children in public schools elsewhere in Virginia. Convinced that the existing financial disparities were not a result of purposeful discrimination, the court blamed the absence of taxable property values in those rural counties.[3]

Thus, as the nation entered the 1970s, state public school finance systems remained intact. Courts, federal and state, adhered to the notion that any existing inequities were the business of state legislatures to remedy, and not the prerogatives of judges. At that point in time, the Burger Court had not ventured into the school finance legal thicket.

Askew v. Hargrave[4] came to the Burger Court in 1971, after a three-judge U.S. district court had declared Florida's school finance scheme (which used state appropriations and local *ad valorem* taxes), violative of the fourteenth amendment's equal protection clause. Focusing upon the discriminatory effect of the finance scheme rather than on the mechanics of the formula itself, the district court reasoned that equal protection required "uniform treatment of persons standing in the same relation to the governmental action."[5]

Subsequently, the Burger Court vacated and remanded the case for reconsideration of whether the U.S. district court should have abstained in deference to a state court proceeding. Since the manner in which the finance system operated was critical in determining the merits of an equal protection claim, the Burger Court held that a full hearing to develop the factual record was first necessary.[6]

In 1973, the Burger Court took the opportunity to make a definite pronouncement on public school finance when it decided *San Antonio Independent School District v. Rodriguez*,[7] a decision that would prove to be a landmark in school law. In a class action initiated by Mexican-American parents whose children were enrolled in an urban school district in San Antonio, a three-judge United States district court originally concluded that Texas' system of public school finance violated the equal protection clause of the fourteenth amendment. Finding wealth a "suspect classification" and education a "fundamental interest," the trial court held that the Texas finance system discriminated on the basis of wealth because of the manner in which education was disparately provided to school districts.[8] The State of Texas appealed to the United States Supreme Court, and the district court was reversed.

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[2] McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.*, McInnis v. Ogilvie, 393 U.S. 322 (1969).

[3] Burress v. Wilkerson, 301 F. Supp. 1237 (W.D. Va. 1968), 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970).

[4] 401 U.S. 476 (1971).

[5] Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970), *vacated sub nom.*, Askew v. Hargrave, 313 F. Supp. 944 (M.D. Fla. 1970).

[6] *Askew*, 401 U.S. 476.

[7] 411 U.S. 1, *reh'g denied*, 411 U.S. 959 (1973).

In a 5-4 decision, written by Justice Powell, the Burger Court reversed the lower court and rejected appellees' rationale on two vital points. In doing so it made some powerful statements with subsequent impact on future school cases. First, no specific class of "poor" had been identified for purposes of establishing a class action claim of discrimination and second, stated Justice Powell for the majority, the importance of public education did not in and of itself "determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[9] Further, stated Powell, education "is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[10] "The solution to problems existing in school finance," he said, "must come from the lawmakers and from the democratic pressures of those who elect them."[11] Thus, the majority made it clear that the Burger Court was not the appropriate forum for such matters, and that solutions to school finance problems lay in the hands of state legislatures and, where necessary, state courts.

Following the *Rodriguez* precedent, matters of school finance returned to the state legislative and judicial arenas. State after state began to reexamine their own educational mandates and to seek solutions to finance issues to prevent litigation in their own courts.[12]

Almost fifteen years later, the Burger Court took a unique finance case out of the Fifth Circuit. Instead of involving a challenge to a state finance formula, the major issue in *Papasan v. Allain*[13] concerned a question of the economic benefit, if any, derived from real property in the form of land granted by the federal government to the State of Mississippi in the early nineteenth century. In the 1850s, the state sold certain land and used the proceeds in loans to railroads which were later destroyed in the Civil War. These lands were never replaced.

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[8] Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280 (W.D. Tex. 1971).

[9] *San Antonio*, 411 U.S. 1.

[10] *Id.* at 35.

[11] *Id.* at 58.

[12] *See, e.g.*, Robinson v. Cahill, 303 A.2d 273 (N.J. 1973) in which the Supreme Court of New Jersey upheld a lower court's ruling that New Jersey's system of public school finance (at the time) was unconstitutional as it related to that state's constitutional mandate to furnish "a thorough and efficient system of public schools."

[13] 478 U.S. 265 (1986).

In *Papasan*, local school officials, in areas affected by the early land sales and investments, brought suit in the federal district court challenging the educational disparities that existed in their school districts because of the land sales and investments. These economic disparities accumulated over time, they said, and deprived contemporary school children of a minimally adequate level of education and of equal protection of the law.[14]

Using *Rodriguez* as precedent, the Burger Court first held, as a matter of procedure, that plaintiffs' claims were not barred by the eleventh amendment, then remanded the case back to the Fifth Circuit. To thoroughly examine the matter of economic disparities, the Burger Court asked that the appeals court determine: (1) whether federal law requires the state to allocate economic benefits to schools in townships in which those lands are located; and (2) if so, whether that federal policy violates equal protection, in which case the state may be enjoined from enforcing it; or whether the state is bound by valid federal law, in which case the funding disparity is rationally related to a legitimate state interest.[15] The implications of these questions, as they might apply to future state level finance cases and claims of economic disparity, have yet to be seen.

5.2 (a) Public Funds to Church-Related Schools

Financial assistance to private sector schools spawned several cases on the Burger Court's docket and, at the same time, produced mixed messages from the justices. And, because so many of the private sector schools were church-related, the Court's pronouncements had ramifications that would be felt far beyond the realm of school finance.

The first major test of the constitutionality of using public funds in support of education in nonpublic school settings came in a landmark decision by the Burger Court in 1971. The case, *Lemon v. Kurtzman*[16] (and its companion case, *Earley v. DiCenso*,[17] from Rhode Island) involved a Pennsylvania law which authorized the Secretary of Education to purchase specified secular services from nonpublic schools. Among other services, the state reimbursed a nonpublic school for teachers' salaries.

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[14] *Id.* at 273.

[15] *Id.* at 288.

[16] 403 U.S. 602 (1971).

[17] In this case the Burger Court declared unconstitutional a state statute allowing for salary supplements for nonpublic school teachers who taught secular subjects in their nonpublic school classrooms.

In declaring the law unconstitutional, the High Court, with Justice Burger delivering the opinion, relied on the Warren Court's decision in *Schempp* (1963) and fashioned a new three-pronged standard for application in future church-state cases.[18] To determine whether legislation is offensive to the first amendment, said the Court, the following questions must be answered: (1) Does the act have a secular legislative purpose? (2) Does the primary effect of the act either advance or inhibit religion? (3) Does the act excessively entangle government and religion?[19] Even though this three-pronged test was fashioned within the narrow confines of this Pennsylvania case, its true value was realized over the decade that followed as the justices consistently relied on its three prongs to analyze situations in which establishment clause violations were alleged.

Two years later, in *Lemon II*, the Burger Court applied its three-pronged standard to a new Parent Reimbursement Act. Since in this new legislation Pennsylvania allowed for direct reimbursement of parents of children enrolled in nonpublic schools, the legislation was upheld since it did not violate the first amendment.[20]

In another 1973 case, *Levitt v. Committee for Public Education & Religious Liberty*,[21] the Burger Court applied the *Lemon* standard and ruled that a New York law allowing reimbursement of nonpublic schools for costs involved in testing, records, and reports constituted excessive entanglement and, as such, represented an impermissible aid to religion. Since most of the $28 million originally earmarked for the program went to the administration of teacher-made tests, the plan was struck down.

Two years later, in *Meek v. Pittenger*,[22] the Burger Court invalidated two more acts of the Pennsylvania legislature as violative of the establishment clause. One statute provided for auxiliary services to nonpublic schools (e.g., counseling, testing, and psychological services, speech and hearing therapy, etc.). Utilizing its *Lemon* standard, the Burger Court held that such services constituted an excessive entanglement in that there existed a potential for fostering religion. The second statute, which provided aid for teaching materials and audiovisual equipment, was also invalidated because the Court decided that it had a primary effect of advancing religion.

Wolman v. Walter[23] came before the Burger Court in 1977, and offered an excellent example of the lack of agreement among the Supreme Court justices. Here the Court ruled specifically on the legality of six kinds of services to nonpublic school pupils in Ohio.

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[18] *Lemon*, 403 U.S. 602.

[19] *Id.*

[20] Lemon v. Kurtzman, 411 U.S. 192 (1973).

[21] 413 U.S. 472 (1973).

[22] 421 U.S. 350 (1975). In this case Justice Stewart announced the Court's judgment and delivered the opinion.

[23] 433 U.S. 229 (1977).

State appropriated funds were paid to the state's public school districts and were expended by them. All disbursements made with respect to private schools had their equivalents in disbursements for public schools, and the amount expended per pupil in nonpublic schools could not exceed the amount expended per pupil in the public schools.[24]

During the 1974-75 school year there were 720 chartered nonpublic schools in Ohio, of which all but twenty-nine were sectarian. More than 96 percent of the nonpublic school students attended sectarian schools and 92 percent attended Catholic schools.[25]

In its analysis, the High Court relied on *Meek*, *Levitt*, and other previous decisions as it treated each issue separately. Using the *Lemon* standard the Burger Court searched for a possible link between the use of public funds and the direct or indirect advancement of religion. In a plurality opinion written by Justice Blackmun, the majority approved of matters such as state financing for therapeutic, remedial, and guidance counseling services in nonpublic schools. The Court disapproved of financing field trips and loaning wall charts and slide projectors for use in nonpublic schools.[26] Why did the Court disapprove of these last two?

The Court considered the field trip portion of the Ohio law as ripe for excessive entanglement. In the Court's reasoning, since the nonpublic school controlled the destination of the trip, and since the nonpublic school teacher was the key to making the trip meaningful, there existed "an unacceptable risk of fostering religion."[27]

The portion of the law that authorized expenditures for the purchase and loan of instructional materials and equipment to pupils or their parents, and the storage of these items on nonpublic school premises, was likewise unacceptable. In the majority's view, it would be impossible to separate the secular education function from the sectarian function. Thus, the state aid could be seen as directly supporting the "religious role of the schools."[28]

Even though the Court's overall vote was 6-3, a total of sixteen dissents were filed on the issues in *Wolman*. This evident splintering among the justices was to become a pattern throughout the remaining Burger years.

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[24] *Id.* at 233.

[25] *Id.*

[26] *Id.* at 256.

[27] *Id.*

[28] *Id.*

5.2 (b) Title I Funds

A case specifically involving aid to underprivileged children in private schools came before the Burger Court in 1974. The case, from Missouri, involved the use of title I funds (20 U.S.C. 241 (a) *et seq.*). *Wheeler v. Barrera*[29] was initiated on behalf of parochial school students who were eligible for title I benefits. The plaintiffs claimed that public school authorities (in their geographical area) violated the Act by failing to provide adequate title I programs for private school children, as compared with programs provided for public school children. Defendants answered that such aid not only exceeded the requirements of the Act, but also contravened the state's constitution, state law, and public policy.

The Burger Court refused to rule on any first amendment religious implications since there was no specific plan for services before the Court. In the Court's opinion, delivered by Justice Blackmun, it was possible to comply with title I without utilizing on-the-premises parochial school instruction. Thus, the children in the private schools were, under the Act, entitled to comparable services. However, they were "not entitled to any particular form of service, and it is the role of the state and local agencies, and not the federal courts, at least at this stage, to formulate a suitable plan."[30]

The decade of the 1980s found the Burger Court continuing its application of the *Lemon* standard to all forms of nonpublic school aid. In 1980, for example, by a 5-4 vote, the Court in *Committee for Public Education & Religious Liberty v. Regan*[31] upheld a New York statute that provided for reimbursement to nonpublic schools for the actual costs of complying with state required testing of students. To the Court, the program passed all three levels of the *Lemon* standard. First, there existed a secular legislative purpose, i.e., the administration of state-prepared tests to school children. Second, the objective nature of the state-prepared tests minimized any chance for religious indoctrination of school children by their teachers. Third, teachers did not compose tests, they merely scored the tests and recorded certain required data. In the Court's opinion, there existed no excessive entanglement of church and state merely because of these accounting procedures.[32]

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[29] 417 U.S. 402 (1974).

[30] *Id.*

[31] 444 U.S. 646 (1980). Justice Blackmun wrote a dissenting opinion, and was joined by Justices Brennan and Marshall. Justice Stevens wrote another dissenting opinion.

[32] *Id.*

Three years later, in another title I case, *Bell v. New Jersey*,[33] the Burger Court held that the federal government may recover misused funds. In the Court's view, the Department of Education may determine administratively the amount of the debt, and the state may seek judicial review of that agency's determination. As Justice O'Connor reasoned, "The State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave assurances that it would abide by the conditions of Title I."[34] Thus, failure to fulfill those assurances would make a state liable for the funds misused.

Two years later, the Supreme Court, in two different cases, reiterated its attitude that the federal government could demand repayment from a state for misused title I funds. In *Bennett v. Kentucky Department of Education*,[35] the Burger Court held that the programs approved by Kentucky clearly violated title I. That same year, in a case out of New Jersey, the Burger Court emphasized the prerogative of the Secretary of Education to conclude that title I funds have been misused, and that "a reviewing court has no independent authority to excuse repayment based on its view of what would be the most equitable outcome."[36] The Burger Court characterized such matters in a secular way when it saw the procedure as no more than "the collection of a bad debt."

In *Aguilar v. Felton*,[37] the issue before the Burger Court once again involved salaries for teachers in parochial schools. For almost nine years, the New York City Board of Education had used title I program funds to pay the salaries of public school teachers who taught in parochial schools. Field personnel from the public school system monitored these title I classes. The programs in these schools provided such secular services as remedial reading, reading skills, remedial mathematics, English as a second language, and guidance. Moreover, no religious symbols were to be visible in these classrooms, no religious materials were to be used, and public school personnel could not participate in any religious activities.

Applying its *Lemon* standard, the Burger Court, in an opinion delivered by Justice Brennan, held that the program violated the establishment clause. The majority saw a potential for political divisiveness and concluded that even where the state aid did not have a primary effect which advanced religion, the aid did create an excessive entanglement between church and state. Even though the New York City effort was well-intended, the monitoring process, said the Court, represented a permanent and pervasive presence.[38] To Justice Brennan, "The pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement."[39] The *Aguilar* majority opinion was accompanied by four powerful dissenting opinions from Justices White, Rehnquist, O'Connor, and Chief Justice Burger. The dissenters saw the majority's decision as denying school age children from low income families, children disadvantaged by poverty, a chance to receive much-needed remedial, nonsectarian educational opportunities. Justice O'Connor summarized her dissent with the following observation regarding the plight of disadvantaged children in New York's parochial schools:

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[33] 461 U.S. 773 (1983).

[34] *Id.*

[35] 470 U.S. 656 (1985). Justice Powell took no part in this decision.

[36] Bennett v. New Jersey, 470 U.S. 632 (1985).

[37] 473 U.S. 402 (1985).

> For these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers (most of whom are of different faiths than their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school. I reject this theory.... I cannot close my eyes to the fact that, over almost two decades, New York's public school teachers have helped thousands of impoverished parochial school children to overcome educational disadvantages without once attempting to inculcate religion. Their praiseworthy efforts have not eroded and do not threaten the religious liberty assured by the Establishment Clause.[40]

Justice O'Connor and her colleagues in dissent made a traditional child benefit theory argument; that is, the disadvantaged child, and not the parochial school, was the primary beneficiary of programs funded under title I. The plight of underprivileged children would continue to face the Court in subsequent cases.

In a companion case, *Grand Rapids School District v. Ball*,[41] the Burger Court, on that same day, struck down both a shared time program and a community education program (each program involving the community's nonpublic schools). In this opinion Justice Brennan showed the majority's extreme sensitivity to the entanglement principle when he said that a "symbolic union" of church and state was manifest in the programs. And, the existence of such a symbolic union works to subsidize the religious functions of those schools and takes over the teaching of secular subjects.

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[38] *Id.* at 412.

[39] *Id.*

[40] *Id.* at 431.

[41] 473 U.S. 373 (1985).

5.2 (c) Tuition and Tax Issues

During the early 1970s, the growing and emotionally laden issue of parent tuition costs encumbered in sending children to private school was added to the Burger Court's docket. In *Committee for Public Education & Religious Liberty v. Nyquist*,[42] the New York State Legislature had enacted provisions allowing for tuition reimbursement. One provision was for a cash reimbursement to low income parents of $50.00 per elementary school child, and $100.00 per secondary school child. The second provision allowed for a tax break to parents who did not otherwise qualify for tuition reimbursement. These parents could deduct a specific amount per child, depending on their taxable income.

Citing the *Lemon* standard, the Burger Court did not resort to the traditional child benefit theory and declared both provisions of the law unconstitutional. Even though the Court saw aid to parents as only an indirect aid to the schools, that result did not lessen the fact that the New York law aided religious education and therefore promoted religion.[43]

A decade later, however, the Burger Court deviated from its past attitudes when it ruled by a vote of 5-4, in *Mueller v. Allen*,[44] that a Minnesota law permitting deductions on state income tax returns for expenses relating to attendance in secondary and elementary schools was constitutional. This time the Court applied the *Lemon* standard to a state law allowing deductions for tuition, books, and transportation for private or parochial school attendance. The Court, in a public policy mode, was convinced that the law had a "secular purpose", namely, the need to produce an educated population of citizens. As a result, the deductions, among many others available, did not create an excessive entanglement of church and state.[45]

The fact that the educational deductions were available to all parents, not just those who sent their children to private schools, was a major determining factor in this decision. The Burger majority saw the Minnesota law as different from, and more acceptable than, state laws that it had declared unconstitutional in prior cases.[46]

More recently, in a different type of tax case, *Allen v. Wright*,[47] parents of black public school children alleged in a nationwide class action that the IRS had not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools. In this case, however, the plaintiffs did not allege that their children had been victims of discriminatory exclusion from those schools. Plaintiffs asserted that the IRS harmed them directly and interfered with the ability of their children to receive an education in a segregated school. Suit was therefore taken against the Secretary of the Treasury and the Commissioner of Internal Revenue.

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[42] 413 U.S. 756 (1973). *See also* Sloan v. Lemon, 413 U.S. 825 (1973).

[43] *Id.*

[44] 463 U.S. 388 (1983). Justice Rehnquist delivered the Court's opinion.

[45] *Id.*

[46] *Id.* at 393. Justice Marshall wrote a strong dissenting opinion in which Justices Brennan, Blackmun, and Stevens joined. They saw the deduction for all parents as a mere pretext to get aid for parochial schools.

[47] 468 U.S. 737 (1984). Justice Brennan wrote a dissenting opinion, and Justice Stevens dissented, joined by Justice Blackmun.

A U.S. district court held that plaintiffs did not have standing to sue. The United States Court of Appeals for the District of Columbia reversed and remanded the case, and the Burger Court granted certiorari.

By a vote of 6-3, the Burger Court reversed the D.C. Circuit. In an opinion delivered by Justice O'Connor, the Court held that: (1) parents did not have standing to prevent the government from violating the law in granting tax exemptions; (2) absent alleged direct injury, standing could not be predicated on a claim of stigmatization caused by racial discrimination; and (3) claim of injury caused by their children's diminished ability to receive an education in a racially integrated school, although a judicially cognizable injury, was not traceable to the government's conduct that was challenged as unlawful.[48] This last point, the establishment of a proximate cause between a child's ability to receive an education and some element of government action places a heavy burden on future plaintiffs, and is consistent with the Burger Court's holdings in earlier finance cases.

5.3 Public Aid to Private Colleges and Students

In addition to the several public elementary and secondary school cases cited in previous sections of this chapter, the Burger Court decided others involving forms of public aid being given to private colleges and universities. In *Hunt v. McNair*,[49] for example, the High Court did not see religion as pervasive in an institution and approved a South Carolina statutory scheme for aiding colleges by the issuance of revenue bonds for projects, excluding any facilities used for sectarian study or religious workshop. The plan called for the college to convey the property to the state authority which would lease it back and reconvey it in payment of bonds, with limitations on its use. Also, the state authority would retain certain rights of control and inspection. Justice Powell, for the majority, utilized the *Lemon* standard and held that the state law had a secular legislative purpose, it neither advanced nor inhibited religion, and it did not foster excessive entanglement of religion and the State of South Carolina.[50]

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[48] *Id.*

[49] 413 U.S. 734 (1973). *See also* Tilton v. Richardson, 403 U.S. 672 (1971).

Four years later, in *Nyquist v. Mauclet*,[51] the Burger Court was confronted with a case involving a New York statute barring certain resident aliens from obtaining financial aid for their college education. In this case, however, religion was not an issue. A U.S. district court had held that the law denied equal protection, and the State of New York appealed.

In a 5-4 decision, the Burger Court affirmed the lower court. Justice Blackmun wrote the opinion for the majority in which he said that: (1) a state classification based on alienage is inherently suspect and thus subject to close judicial scrutiny; (2) the statutory scheme discriminated against aliens; (3) any incentive provided by the plan for an alien to become naturalized was not a proper state concern; (4) even if the concern was legitimate, it did not justify the discrimination; and (5) the claim that the law would enhance the educational level of the electorate was not sufficient to support the discrimination.[52]

The questions of tax exempt status and racial discrimination in private colleges came before the Burger Court in two college cases from the 1983-84 terms. In 1983, in a South Carolina case, *Bob Jones University v. United States*,[53] the Burger Court upheld the denial of tax exempt status (as granted by the Internal Revenue Code, Section 501 (c)(3)) to a religious college because it admitted to racially discriminatory practices on campus (a prohibition regarding interracial dating). The Burger Court majority (only Justice Rehnquist dissented) used a "public policy," "public interest" rationale to uphold the IRS' denial, and to overcome the University's claim that its free exercise of religious beliefs had been violated.[54]

In a second case, *Grove City College v. Bell*,[55] the Burger Court was faced with a more nebulous situation in which a private coeducational, liberal arts college had refused to file the Assurance of Compliance required by title IX regulations, as requested by the U.S. Department of Education. At no time was the Court faced with any allegation of sex discrimination, and the College itself, as an institution, did not receive any federal money. Grove City College had a policy of refusing government financial assistance, to avoid any government regulation of the school. And, when the United States Department of Education (D.O.E.) requested that Grove City submit an Assurance of Compliance form, the College refused on the ground that it did not receive any direct federal aid. When D.O.E. cut off Basic Educational Opportunity Grants to Grove City students, some of the students brought suit challenging D.O.E.

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[50] *Id.* The Court's attitude that religion was not pervasive led to the conclusion that South Carolina's issuance of revenue bonds was permissible.

[51] 432 U.S. 1 (1977). *See also* Vlandis v. Klein, 412 U.S. 441 (1973).

[52] *Nyquist v. Mauclet*, 432 U.S. 1.

[53] 461 U.S. 574 (1983). Justice Powell wrote a concurring opinion. Justice Rehnquist dissented.

[54] *Id.*

[55] 465 U.S. 555 (1984).

In a decision that can be characterized as "program specific," the Court ruled that Grove City College must file the Assurance of Compliance form with the government, since the College did receive indirect federal assistance in the form of student aid administered through its financial aid program.[56] The Burger Court did not say, however, that Grove City College had to comply with the requirements of title IX. As Justice White said, "Since Grove City operates an educational program or activity receiving Federal financial assistance the Department may properly demand the College to execute an Assurance of Compliance with Title IX."[57] He then qualified this statement: "the fact that federal funds eventually reach the College's general operating budget cannot subject Grove City to institutional coverage."[58]

Two years later, in *Witters v. Washington Department of Services for the Blind*,[59] the Burger Court, in what might be called a "spirit of accommodation," decided a somewhat different student finance case from the private sector of higher education. In this case, religion once again became an overriding issue.

Perry Witters, a student at a private Christian college, was pursuing a degree to become a pastor, missionary, and youth director. Suffering from a progressive eye condition, he had applied to the Washington Commission for the Blind for vocational rehabilitation pursuant to a Washington statute. The Commission denied him aid (on the ground that it was prohibited by the State Constitution), and the Commission's denial was upheld on administrative appeal. Basing its decision on first amendment establishment grounds, the Washington Supreme Court affirmed.

The Burger Court, by a unanimous vote, remanded the case. In a somewhat surprising deviation from its past oversensitivity to possible church-state entanglement, the Burger Court, in a very brief opinion, held that the first amendment did not preclude a state from extending direct assistance under a state vocational rehabilitation assistance program to a blind person who chose to study at a Christian college. Utilizing the *Lemon* standard, the Burger Court concluded that the facts did not support the view that the state aid flowing to the college resulted in a "state action sponsoring or subsidizing religion."[60] The student had selected "neutrally available state aid to help pay for his religious education...."[61] This, in and of itself, did not constitute a state endorsement of religion, especially since there was no evidence that any other individual had ever sought to finance a religious education or activity through this same program.[62]

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[56] *Id.* at 558.

[57] *Id.* at 562.

[58] *Id.* at 570. Justice Brennan, with whom Justice Marshall joined, concurred in part and dissented in part.

[59] 474 U.S. 481 (1986).

5.4 Other Finance Issues

Over the years, the Burger Court wrestled with other types of educational finance issues. In 1979, the Burger Court decided *Board of Education v. Harris*,[63] a case involving the New York City Board of Education and its ineligibility to receive federal assistance under a federal statute, the Emergency School Aid Act (ESAA). By a 6-3 vote, the Court held that: (1) discriminatory impact is the standard by which eligibility under ESAA is to be measured, irrespective of whether the discrimination relates to "demotion or dismissal of instructional or other personnel" or to "the hiring, promotion or assignment of employees;" (2) a prima facie case of discriminatory impact may be a proper statistical study, and, in fact, was made there; and (3) the burden of rebutting the case was on the school board.[64] Thus, the Burger Court agreed with the court of appeals, that the school board's proffered justification for racially disproportionate assignments of minority teachers did not adequately rebut the prima facie case of discrimination.

During its 1981 term, the Burger Court decided a case involving a civil rights action taken under 42 U.S.C. section 1983 by some discharged teachers and counselors who had worked in a private, nonprofit school for maladjusted students. Even though plaintiffs claimed violations of their constitutional rights by the private school, the issues actually turned on a basic finance question: Did the fact that the privately operated, nonprofit school received public funds bring its personnel discharge decisions within the parameters of section 1983? In *Rendell-Baker v. Kohn*,[65] the Burger

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[60] *Id.* at 487.

[61] *Id.* at 489.

[62] *Id.*

[63] 444 U.S. 130 (1979).

[64] *Id.* Justice Stewart filed a dissenting opinion in which he was joined by Justices Rehnquist and Powell.

[65] 457 U.S. 830 (1982). In this decision Justice Marshall issued a dissenting opinion in which he was joined by Justice Brennan.

Court, by a 7-2 vote, held that a school's provision of services to students at public expense did not make those services the exclusive province of the state so as to subject the school to suit under section 1983. In an opinion that had a limiting effect on the scope of subsequent civil rights actions, the Court held that the acts of the school were not exercises of "state action." The school's fiscal relationship with the state was not different from that of many contractors performing services for the government. As such, no "symbiotic relationship" existed between the private school and the state.[66]

Decided on January 12, 1982, *Valley Forge Christian College v. Americans United for Separation of Church and State* [67] presented the Burger Court with a unique finance issue; namely, the transfer of government property to a religious school without payment being made for the property. The property which caused the controversy was acquired by the Department of the Army in 1942. Thirty years later, the Army built Valley Forge General Hospital on the land. And, in 1973, the General Services Administration declared it to be surplus property. The Department of Health Education and Welfare in 1976 eventually conveyed a seventy-seven acre tract of the land to Valley Forge Christian College (a nonprofit organization under the supervision of the Assemblies of God). The deed from HEW conveyed the land to the College to be used solely for "educational purposes."

In 1976, the Americans United organization (90,000 taxpayer members) brought suit in federal court challenging the conveyance on first amendment grounds. The members claimed that "the conveyance was null and void," and they sought an order compelling the College to transfer the land back to the United States. The district court held that the taxpayers lacked standing to sue, granted summary judgment, and dismissed the suit. The Third Circuit reversed and the Burger Court granted certiorari.

By a vote of 5-4, the Burger Court reversed the Third Circuit. According to Justice Rehnquist, for the majority: (1) standing focuses on the party and not the issues in a suit; (2) the taxpayers' organization failed to identify any personal injury suffered as a consequence of the transfer of property; and (3) enforcement of the establishment clause does not demand special exception from the requirement that plaintiff claim a distinct and palpable injury to himself that is likely to be redressed if requested relief is granted by the court.[68]

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[66] *Id.* Here the Burger Court focused upon the need to show actual state control, an absence of which would make the matter a conflict between "private parties."

[67] 454 U.S. 464 (1982).

[68] *Id.* Here the taxpayer group could not show a "real interest" in challenging the federal conveyance.

The dissenters (Justices Brennan, Marshall, Blackmun, and Stevens) saw the Court as using the technicality of standing to avoid the more substantive establishment issue. These justices saw the federal government's transfer of property worth $1,300,000 to the Assemblies of God as extremely important to the American taxpayer, a fact which the majority did not believe was significant.[69]

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[69] *Id.* Justice Brennan dissented, joined by Justices Marshall and Blackmun. Justice Stevens filed a separate dissent.

CHAPTER SIX

THE CIVIL RIGHTS TORT DURING THE BURGER YEARS

6.0 Introduction

With the exception of the sudden growth of issues involving the racial desegregation of public schools in the mid- and late-1950s (post-*Brown*), school-related litigation remained minimal as public education moved through the early 1960s. However, the judicial scene began to change in the mid-1960s, as an old civil rights law was rediscovered and used in challenges to a broad spectrum of public school board and administrator activities. That law was the Civil Rights Act of 1871.

Originally intended to help operationalize the guarantees of the fourteenth amendment as they applied to newly freed blacks in the southeastern United States, section 1983 of the Act provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.[1]

Although there was an original intent to deter direct abuse of state authority, section 1983 has nevertheless evolved into a broad remedy for persons whose civil rights have been violated through some exercise of official state action.

Generally, in the years immediately preceding the Burger Court, section 1983 remained a judicial abstraction and was rarely referred to or relied upon in litigation. Moreover, the Supreme Court seemed reluctant to disturb official immunity from damage claims taken under section 1983. Typically, the cases coming to the High Court involved nonschool matters. In *Tenney v. Brandhove*,[2] for example, the Court held that state legislators had absolute immunity from damages when they acted within their official capacity. Similarly, in *Pierson v. Ray*,[3] the Court held that state officials are absolutely immune from damages for actions taken within the scope of their official authority.

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[1] 42 U.S.C. §1983 (1871). In its formative days this law was referred to as the "Ku Klux Klan Act." For an excellent, comprehensive, contemporary commentary see, Horner, *The Anatomy of a Constitutional Tort*, 47 West's Educ. L. Rptr. 1 (1988).

[2] 341 U.S. 367 (1951). In this case the plaintiff sought damages against members of the California Senate Fact Finding Committee on Unamerican Activities.

[3] 386 U.S. 547 (1967). More specifically, in *Pierson* the Court held that judges must be absolutely immune from damages for actions within their official scope of authority.

Monroe v. Pape[4] is the pre-Burger Supreme Court decision that launched a new trend in the doctrine of official immunity. In *Monroe* the Supreme Court, in an unprecedented move, held that local government officials could be held liable for damages in section 1983 actions.[5]

In the years leading up to *Monroe*, section 1983 was used sparingly and without success in public school cases. In 1966, however, the Fourth Circuit saw section 1983 as applicable to education and to educators. In *Johnson v. Branch*,[6] a black teacher with twelve years of job experience who was very active in the civil rights movement in her community was not rehired by her school board. Taking her complaint into federal district court, she challenged her nonrenewal. Johnson alleged that the board's sole reason for not rehiring her as a teacher was her record as a civil rights activist in the community.[7] The trial court did not agree, and she took her case to the Fourth Circuit, where the lower court was reversed. The appellate court remanded her case with instructions. Finding error in the district court's methods in determining its findings, the appellate court reached the following conclusion:

> It is apparent on this record that absent the racial question, the issue would not have arisen. The only reasonable inference not to renew Mrs. Johnson's contract in the face of her splendid record of twelve years on such trivial charges was the Board members' objections to her racial activity.[8]

In fashioning a remedy under section 1983, the court directed the school board to renew Mrs. Johnson's contract. Additionally, possible damages against school officials were to be determined.[9]

The Johnson decision helped clear the way for thousands of public school employees and students to sue school board members for alleged violations of their civil rights. It forced public school boards to think through their official decisions more carefully, and it prompted employees and students to assess the scope of their rights, free from school board intrusion, within the educational context.

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[4] 365 U.S. 167 (1961). Portions of the remainder of this chapter are developed from R.S. Vacca and H.C. Hudgins, LIABILITY OF SCHOOL OFFICIALS AND ADMINISTRATORS FOR CIVIL RIGHTS TORTS (Charlottesville, VA: The Michie Company, 1982).

[5] *Id.* This decision is often referred to as a pivotal point in the application of section 1983 liability to local governmental bodies.

[6] 364 F.2d 177 (4th Cir. 1966).

[7] *Id.* at 178.

[8] *Id.* at 182. The record disclosed that the defendants conceded that appellant was "a well qualified, conscientious, and competent teacher...".

[9] *Id.*

Tinker,[10] the benchmark student rights decision from the Warren Court Era, which was decided just before Justice Burger was made Chief Justice, was a section 1983 case. However, it would not be until six years later, in an Arkansas case, *Wood v. Strickland*,[11] that the High Court would see fit to extend the remedy under the old Civil Rights Act to students in public schools.

During the Burger years (1969-1986), section 1983 challenges to local school board and administrative authority continued, and expanded into such areas as student control and discipline. In 1975, the Supreme Court decided *Wood* and ruled that public school students had standing to sue school officials who denied them their constitutional rights.[12] The Court recognized, however, that school officials should still possess some degree of immunity for their acts. To hold otherwise would certainly limit the number of people willing to serve as board members or school administrators.[13]

In *Wood*, two students in an Arkansas high school had been disciplined for what school officials said was a violation of a rule prohibiting use or possession of intoxicating beverages at school or school-sponsored functions. Charging that their fourteenth amendment due process entitlements were impinged upon by their expulsions from school, the students used section 1983 to seek compensatory and punitive damages, expungement of their records, and reinstatement to school. Ultimately, the case reached the Supreme Court.

In remanding the case to the Eighth Circuit, the Burger Court majority set into place the following standard for determining possible section 1983 liability of school officials:

> The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of student's daily lives than by the presence of actual malice.[14]

In effect, the Burger Court's opinion fashioned a qualified good faith immunity. To put it another way, the Court said that public school officials could not claim an absolute immunity as individuals for damages if they knew, or reasonably should have known, that their actions would violate the constitutional rights of their students, or if they had acted toward a student with a malicious intent.

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[10] 393 U.S. 503 (1969).

[11] 420 U.S. 308 (1975). The standard articulated by the Burger Court to determine if section 1983 liability applies was: "[A] school board member is not immune from liability for damages under section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."

[12] *Id.* at 322.

[13] *Id.*

[14] *Id.*

A decade later, in a highly publicized nonschool case involving the Attorney General of the United States, the Burger Court majority refused to grant absolute immunity to that public official.[15] The Court used a rationale similar to that used in the *Wood* opinion, even though the official activities of that office often involved national security. To Justice White, the majority was convinced that this would achieve a balance between protecting the officer from "frivolous and vexatious complaints," while not leaving him free to violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[16]

6.1 Attorneys' Fees and Costs in Section 1983 Actions

As school board members and administrators know, taking a case to court and processing the matter through the judicial system costs a great deal of money. And, a major portion of the expense is the payment of attorneys' fees. In 1978, the Burger Court held, in *Monell v. Department of Social Services*,[17] that the Civil Rights Attorney's Fees Awards Act of 1976 allows prevailing parties to obtain attorneys' fees in 1983 cases. Two years later, in *Maine v. Thiboutot*[18] (a nonschool case) the Supreme Court reaffirmed the *Monell* holding by saying that attorneys' fees may be awarded to prevailing parties as a part of costs.

Generally, prevailing parties may also receive reimbursement for reasonable expenses and costs incurred during litigation. However, establishing who is the prevailing party in a section 1983 action is not a clear-cut matter. Procedurally, it is the responsibility of the party making this claim to establish it; and, where this is established, courts possess the discretion to make awards, including out-of-pocket costs incurred as a direct result of the litigation and directly related to the success of the prevailing party.

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[15] Mitchell v. Forsyth, 472 U.S. 511 (1985).

[16] *Id.* at 525. Justices Rehnquist and Powell took no part in this decision, while Justices Brennan and Marshall concurred, but dissented in part. *See also* Harlow v. Fitzgerald, 457 U.S. 800 (1982) wherein ignorance of well-established law and evidence of bad faith are linked together. Also, in *Harlow* the Court held that government officials are shielded from liability for discretionary acts if their conduct does not violate clearly established rights, statutory or constitutional.

[17] 436 U.S. 658 (1978). The Civil Rights Attorney's Fees Awards Act of 1976 (amending 42 U.S.C. 1988 [1979]) allows prevailing parties, other than the United States, reasonable attorneys' fees in certain civil rights actions as a way of transferring the costs of litigation to those who infringe on someone else's basic civil rights.

[18] 448 U.S. 1 (1980). *See also* the companion case Maher v. Gagne, 448 U.S. 122 (1980).

There is no set scale for figuring costs. However, some courts have attempted to set limits in attorneys' fees and costs awarded; thus, the amounts vary from case to case and generally depend on such factors as hours spent and the prevailing market rates for legal services rendered.

In *Webb v. Board of Education*,[19] for example, a federal district court judge had awarded attorneys' fees to a black elementary school teacher who had prevailed in a section 1983 action challenging his termination from employment. The court awarded $9,734.38 plus expenses, even though the successful plaintiff had requested a total fee of $21,165.00. As the prevailing party, the teacher asked that the fee be based on an hourly rate of $120 and include an upward adjustment of twenty-five percent "in light of the peculiar difficulties involved in this particular kind of case and the unusual nature of the hours involved in the Board proceedings."[20] The board of education objected to the hourly rate, to certain miscellaneous, unrecorded hours, and to the upward adjustment of twenty-five percent. In making its award, the district court accepted the board's position. That award was affirmed on appeal to the Sixth Circuit.

Granting certiorari, the Burger Court majority ultimately agreed and held that the prevailing teacher was not entitled to attorneys' fees for time spent by counsel pursuing optional administrative proceedings before the school board. And, said Justice Stevens for the majority, the district court had the discretion to determine the amount of an award. But, he continued, on appeal "the reviewing court must evaluate its reasonableness with appropriate deference."[21]

The Burger Court, in *Maher v. Gagne*, expanded the concept of attorneys' fees to prevailing parties when it said that there is "no reason to discriminate in awarding fees between parties who prevail in full litigation and those who win in settlement."[22] And, added the Court, "success on 'any significant issue' which achieves some benefit which had been sought is sufficient to consider plaintiffs prevailing parties."[23]

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[19] 471 U.S. 234 (1985). Justice Marshall took no part in this decision, while Justices Brennan and Blackmun concurred in part and dissented in part.

[20] *Id.* at 238.

[21] *Id.*

[22] 448 U.S. 122 (1980). In 1989, the Rehnquist Court clarified the difference between attorneys' fees to prevailing parties as a part of costs and those for retroactive liability and preparation work, as costs not necessarily barred by the eleventh amendment. *See* Missouri v. Jenkins, 109 S. Ct. 2463 (1989).

[23] *Id.* More recently, in Texas State Teachers Ass'n v. Garland Indep. School Dist., 57 L.W. 4383 (March 28, 1989), the Rehnquist Court held that a litigant need only demonstrate success on any significant issue that materially alters the legal relationship between the parties to be eligible for an award of attorneys' fees under 42 U.S.C. section 1988.

The relationship between the extent of success and the amount of attorneys' fees is an important factor in setting the proper amount of the award. In *Hensley v. Eckerhart*,[24] for example, a nonschool case involving a class action brought on behalf of all persons involuntarily confined to a forensic unit of a state hospital, the Burger Court vacated and remanded the matter since the district court below had failed to consider that important relationship. As Justice Powell stated for the majority:

> We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. §1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.[25]

As one can infer from the above statements, school boards and administrators should keep detailed documentation of time spent with their legal counsel so that reasonable assessments can be made if and when attorneys' fee awards are determined appropriate by a court.

The matter of attorneys' fees, coupled with section 1983, also came before the Burger Court in the context of special education decisions from the lower federal courts. In *Smith v. Robinson*,[26] a case discussed more thoroughly in a subsequent section of this chapter, the Court made it clear that such fee awards are not without qualification. Justice Blackmun delivered the majority opinion in which he said that the Education for All Handicapped Children Act of 1975 was the exclusive avenue through which individuals could assert an equal protection claim to a publicly financed special education. Thus, he stressed that those who prevail are "not entitled to award of attorneys' fees under the Civil Rights Attorney's Fees Awards Act by relying on Section 1983 as a remedy . . . in addition to their reliance on the Education for All Handicapped Children Act."[27]

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[24] 461 U.S. 424 (1983). Here Justice Brennan concurred and dissented in part, joined by Justices Marshall, Blackmun, and Stevens.

[25] *Id.* at 440. In *Hensley*, the Court said that litigants may be considered prevailing if they "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit."

[26] 468 U.S. 992 (1984). Justice Brennan dissented, joined by Justices Marshall and Stevens.

[27] *Id.* at 1012. In a footnote in *Smith* the Burger Court reiterates that courts generally agree that damages are available under section 504, Rehabilitation Act of 1973 but are available under EHA only in exceptional circumstances. Here the opinion cites Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982), *cert. denied*, 459 U.S. 909 (1982).

During its next term, the Burger Court continued its reluctance to extend recovery of attorneys' fees to parties who gained relief under the Education for All Handicapped Children Act, as demonstrated in the much heralded *Irving Independent School District v. Tatro* decision.[28] In *Tatro*, a federal district court had, on remand from the Fifth Circuit Court of Appeals, held that the Tatros had also proven a violation of the Rehabilitation Act (1973), section 504, and awarded them attorneys' fees under section 505 of that Act. This was affirmed by the appellate court. The Burger Court, however, by a unanimous vote, held to its strict position that relief was available under the Education for All Handicapped Children Act of 1975, and, as such, relief was unavailable under the Rehabilitation Act. Thus, the Court left undisturbed its edict that attorneys' fees could not be recovered under the latter Act, even though the suit was successful.[29]

6.2 Exhaustion of Administrative Remedies

Under our system of justice, citizens go to court seeking remedies. As a general rule, however, in our form of government, there exist other means for resolving disputes before individuals take their prayers for relief into the courts.

In recent years increasing numbers of individuals and groups have resorted to the courts as their first source of dispute resolution. And, since administrative mechanisms exist for the resolution of education controversies, exhaustion of these existing sources of remedy has been required before taking court action.

Ordinarily, state legislative or administrative remedies must be exhausted before one seeks redress in the federal courts. And, where a federal statute so provides, state judicial remedies must be exhausted before taking litigation to a federal forum. Unless a statute so mandates, exhaustion of state judicial remedies is not a prerequisite to taking a section 1983 public school case to federal court.

Recent interpretations of section 1983 also suggest a more flexible interpretation of the exhaustion of state legislative or administrative remedies rule. As Currie has commented, "the statute does not require exhaustion if state remedies are 'ineffective' to protect petitioner's rights."[30]

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[28] 468 U.S. 883 (1984).

[29] *Id.* at 895. It should be noted at this point, however, that some lower courts have subsequently either granted or recognized the propriety of attorneys' fees under the EHA. For a commentary on this point of law, see, specifically, Kearns & Zirkel, *Attorneys' Fees and Exclusivity in Special Education Suits*, 43 West's Educ. L. Rep. 1263 (1988).

[30] D.P. Currie, FEDERAL JURISDICTION IN A NUTSHELL at 73 (1976).

Thus, section 1983 was not intended as a "first source," but rather to supplement existing state remedies, or to override existing state remedies if they are inadequate, ineffective, or nonexistent.

For example, in *Wagle v. Murray*,[31] a public school teacher case, the Ninth Circuit Court indicated that exhaustion of state administrative remedies is a prerequisite under section 1983, unless requiring such exhaustion would leave a plaintiff without remedy. Subsequently, the Burger Court vacated this decision.[32]

6.3 Section 1983 and School Employment

As public education entered the decade of the 1960s, the Warren Court was busy hearing a variety of employment cases. As earlier sections of this chapter illustrate, section 1983 began to emerge from this body of case law as an alternative source of remedy for a variety of employees claiming injury suffered because of some official exercise of state action. And, as Chapter 2 discussed, teachers and other school employees in the mid to late 1960s began to successfully rely on the civil rights tort action to rectify abuses of school board and administrative authority.

Because of the Burger Court's attitudes expressed in such opinions as *Mt. Healthy*[33] and *Givhan*[34], the lower courts gradually departed from their traditional attitude of reluctance to intervene in conflicts that occur in the day-to-day operation of public schools. The more modern judicial view sees intervention as warranted whenever an employee was either left without remedy or where the existing remedy was ineffective. Also, in a case in which an employee's constitutional or statutory protections were directly implicated, intervention may be appropriate. Thus, over the seventeen Burger Court years, section 1983 played a key role in a variety of school employee cases involving such issues as freedom of speech inside and outside of school; employee dress and other forms of expression; employees' private lives; and discrimination.

The case law reviewed in this book demonstrates that in the post-Burger years, school boards, school board members, and administrators will be held liable under section 1983, if their official actions violate the civil rights of an employee, whether or not that employee is a tenured professional employee. Contemporary public school officials cannot avail themselves of ignorance or the affirmative defense of good faith if they knew or should have known that their actions violated an employee's civil rights as an American citizen.

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[31] 546 F.2d 1329 (9th Cir. 1976), *vacated*, 431 U.S. 935 (1977).

[32] *Id.* In this decision, the Court did not indicate that total exhaustion of administrative remedies was a prerequisite to federal judicial review, if the teacher would be left without remedy.

[33] *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977), *aff'd on reh'g*, 670 F.2d 59 (6th Cir. 1981).

[34] *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979).

6.4 Section 1983 and Student Matters

As the case law discussed in Chapter 3 illustrates, the 1960s and 1970s also marked an increase in student litigation involving section 1983. During the Burger years, several decisions were delivered affecting the basic civil rights of youngsters both outside and inside the public schools of this nation. Through such landmark decisions as *Wood v. Strickland*,[35] *Goss v. Lopez*,[36] and *Carey v. Piphus*,[37] the High Court included students under the protective umbrella of the newly recognized civil rights tort action available in section 1983. Of the three major categories of section 1983 litigants (parents, employees, and students), student claimants would prove to be less successful in their actions against school officials. However, student cases continued to come before the Burger Court.

In the mid-1970s, for example, freedom of expression involving students in public schools took a new path. Instead of dealing with the right of students to give or exhibit their ideas and opinions, the new category of cases dealt with the right of students to receive the ideas, beliefs, and information of others. Against that general backdrop, section 1983 was used as a vehicle to challenge the traditional authority of school boards to determine what subjects should be studied and what curricular materials would be used in the schools under their jurisdiction.

The Burger Court had an opportunity to get involved in this new thicket of legal and constitutional issues with *Pico*,[38] a case discussed more fully in Chapter 3.

Justice Brennan announced the judgment of the Burger Court. The basic issue presented in *Pico* was whether the first amendment imposes limitations upon the exercise of a local school board's libraries. While a plurality rejected the board's claim of absolute discretion to remove books from its school libraries, the Court's majority did not say that school boards are without authority to determine the content of those libraries. In fact, the Court said that local school boards possess "significant discretion" to make such decisions.[39]

Because the substantive issues in the case were not resolved the Burger Court did not make any specific pronouncements regarding the applicability of section 1983. Thus, there is no extension of the section 1983 remedy to public school students, i.e., to the students in this case who had alleged a denial of their constitutional rights by the action of a local school board in removing the books from the public school library.

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[35] 420 U.S. 308 (1975).
[36] 419 U.S. 565 (1975).
[37] 435 U.S. 247 (1978).
[38] 457 U.S. 853 (1982).
[39] *Id.* at 861-64.

6.5 Section 1983 and Special Education Matters

In 1975, Congress passed the Education for All Handicapped Children Act (EHA).[40] The new law provided a comprehensive mandate that all handicapped children, as defined in the Act, between the ages of three and eighteen were entitled to a free, appropriate education no later than September 1, 1978; and all handicapped children, as defined in the Act, between the ages of three and twenty-one were entitled to a free, appropriate education no later than September 1, 1980. Moreover, the Act made federal funds available to states to establish a specific plan for educating all handicapped children in the least restrictive environment. The Act also mandated that an individualized education program (IEP) be developed for each child covered by the provisions of the law.

In addition to the above provisions, the EHA contained very detailed procedural safeguards, including established avenues of redress and appeal for local school systems (local education agencies or LEAs), and for children and parents covered by the law. As a general rule, the intent was to provide remedy to aggrieved individuals, without resort to adjudication. Generally, the lower courts during the Burger era saw court action as premature unless the administrative remedies provided under the EHA had been exhausted.[41] However, where exhaustion of these remedies would be futile, would cause plaintiffs irreparable harm, or where such remedies were inadequate, taking an early action in court would not be considered as premature.

Since the implementation of the Act, a number of court cases have been initiated. Most of these cases involved some specific provision of the Act itself. However, some others were argued on allegations that school systems were in violation of section 504 of the Rehabilitation Act of 1973,[42] while others combined both statutes. As special education law moved into the late 1970s, section 1983 began to play a role as a source of remedy in court actions taken against school boards and administrators, at both the state and local levels. In addition to seeking injunctions and other forms of equitable relief, plaintiffs in section 1983 cases sought remedies in the form of monetary damages and attorneys' fees.

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[40] 20 U.S.C. 1401, *et seq.*

[41] *See, e.g.*, Pinkerton v. Moye, 509 F. Supp. 107 (W.D. Va. 1981) for a case involving an alleged violation of the EHA and a subsequent section 1983 suit by parents.

[42] 29 U.S.C. 701, *et seq. See, e.g.*, Miener v. Missouri, 673 F.2d 969 (8th Cir. 1981), *cert. denied*, 459 U.S. 909 (1982). *See also* Harris v. Campbell, 472 F. Supp. 51 (E.D. Va. 1979).

In 1984, the Burger Court granted certiorari in a case out of the First Circuit. *Smith v. Robinson*[43] involved an action brought by parents of an eight-year-old male who suffered from cerebral palsy. The parents challenged a local school board's decision to no longer fund the child's placement in a hospital setting. The school board based its decision on its interpretation of Rhode Island law that placed the responsibility for educating an "emotionally disturbed" child in the State Division of Mental Health, Retardation and Hospitals, and not in the public schools.[44]

The parents ultimately prevailed in federal district court where, in 1981, two orders were issued. In the first order the court denied the state's motion to dismiss the matter. In the second order the district court declared that the eight-year-old was entitled to a free appropriate education, paid for by the local education agency (the school board). The parents as prevailing parties also received attorneys' fees.[45]

On appeal by the school board, the First Circuit Court reversed the lower court. In the appellate court's opinion any relief available to parents had to come from the EHA. And, said the court, this comprehensive Act did not include the possibility of attorneys' fees.[46]

The Burger Court subsequently affirmed the First Circuit's decision. In a majority opinion delivered by Justice Blackmun, with Justices Marshall, Brennan and Stevens in dissent, the High Court made the following pronouncements: (1) the EHA is the exclusive avenue for parents to assert their equal protection claim to a public financed education for their child; (2) different claims, for different relief, based on different facts and legal theories could not be treated as the same simply because one of them is a constitutional claim; (3) where the exclusive remedy was the EHA, parents had to rely upon it and not mix section 504 and section 1983 in as alternatives to the EHA; (4) parents were not entitled to attorneys' fees (available under 42 U.S.C. section 1988, the Civil Rights Attorney's Fees Act), by relying on section 1983, in addition to the EHA; and (5) courts generally agree that damages are available under section 504, Rehabilitation Act 1973, but are available under the EHA only in exceptional circumstances.[47]

The cases to date have continued the Burger Court's cautious inclusion of section 1983 in special education litigation. The prevailing rule remains that the EHA is the exclusive source of remedy and that specific statute will not be enlarged or ignored by a reliance on the emerging civil rights tort in search of monetary damages.[48]

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[43] 468 U.S. 992 (1984).
[44] *Id.* at 995.
[45] *Id.* at 1000.
[46] *Id.*
[47] *Id.* at 1021-1031.

6.6 (a) *Res Judicata* as a Defense

In earlier subsections of this chapter the immunity status (absolute and qualified) of state officials and others acting under color of state authority was discussed. There are, however, other possible defenses available to school officials charged with civil rights violations: *res judicata*, collateral estoppel, statute of limitations, eleventh amendment immunity, and good faith.

Since the possibility exists that some section 1983 matters involving public schools may come into federal court after settlement in state court, the question arises as to the applicability of the *res judicata* principle. A basic tenet of civil procedure, the term simply means "a thing decided," or "a matter adjudged."[49] In essence, and in everyday terms, the principle dictates that something finally decided by one court will not be decided again by that court or any other court. As a general rule, no suit on the same subject, by the same parties, based upon the same "nucleus of the operative facts" should be relitigated.[50] In such situations, *res judicata* may serve as a bar to relitigation.

Generally, and as a matter of procedure, courts hear specific cases brought by the parties, and decide the issues present in those specific cases. However, a court can actually dispose of a case without bringing the entire legal controversy to final resolution. *Res judicata* bars the relitigation of an identical claim. Focusing specifically on the parties, *res judicata* holds that,

> A final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.[51]

In other words, where the forum court has jurisdiction over every plaintiff whose claim it adjudicates, a *res judicata* defense in a later suit will be appropriate.

Speaking directly to *res judicata* and section 1983, Levinson has said that,

> [t]here is little reason to fear that allowing 1983 actions after state

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[48] *Id.* It is interesting to note the Rehnquist Court's attitude on this point of law, as stated recently in Honig v. Doe, 108 S. Ct. 592 (1988), that parents may bypass the administrative process of the EHA where exhaustion of administrative remedies would be either futile or inadequate.

[49] BLACK'S LAW DICTIONARY at 1174 (5th ed. 1979).

[50] Vacca and Hudgins, *supra* note 4, at 25. The federal court may admit pendent party claims under section 1983. In such claims the three part test articulated in Gibbs v. United Mine Workers, 883 U.S. 715 (1966), and Aldinger v. Howard, 427 U.S. 1 (1976), must be satisfied.

[51] Black's, *supra* note 49, at 1174. *See also* Dorn v. Commonwealth, 3 Va. App. 110, 113 (Va. 1986).

> court proceedings will permit double recovery. Section 1983 was designed, in part, to provide remedies that are not available or not commonly sought in the state forum. Further, the majority of 1983 cases which follow state proceedings are brought precisely because the state judgment did not prove satisfactory.[52]

Current case law holds that exhaustion of state administrative remedies, and not state judicial remedies, is more consistently held a necessary prerequisite under section 1983, unless requiring such steps would leave a plaintiff without any remedy at all. And it should be remembered that, as a matter of procedure, the decisions of the highest court in a state have the potential to be reviewed by the United States Supreme Court, where any right, privilege, or immunity exists and is claimed under the Constitution or the federal statutes, or where a state court has upheld a state law or constitutional provision in conflict with the federal Constitution or laws.[53]

The Burger Court, through Justice Blackmun, in an extensive footnote in *Migra v. Warren City School District Board of Education*,[54] a case involving a section 1983 suit filed by a supervisor of elementary education in Ohio, defined the doctrine of *res judicata* in the following way:

> *Res judicata* is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided.... This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law or merger and bar.
>
> This Court on more than one occasion has used the term '*res judicata*' in a narrow sense, so as to exclude issue preclusion or collateral estoppel.... When using that formulation '*res judicata*' becomes virtually synonymous with "claim preclusion."[55]

The Burger Court vacated and remanded the case to the Sixth Circuit, to instruct the district court to interpret Ohio preclusion law and apply it to this case.

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[52] Levenson, *Res Judicata and Section 1983: The Effect of State Court Judgments on Federal Civil Rights Actions*, 27 UCLA L. Rev. 177 (1979). It must be remembered that section 1983 creates neither procedural nor substantive rights, nor does it create federal jurisdiction, nor can it be relied upon where adequate remedy exists in state law.

[53] It should be pointed out that on June 27, 1988, President Reagan signed Public Law 100-352 (102 Stat. 662) which eliminated virtually all of the Supreme Court's mandatory appeal jurisdiction, effective September 25, 1988. Thus, federal and state court decisions likely will get to the Supreme Court where certiorari is granted.

[54] 465 U.S. 75 (1984).

[55] *Id.* at 77. Here in footnote 1, Justice Blackmun relies on RESTATEMENT (Second) OF JUDGMENTS (1982); and C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE (2nd ed. 1981).

In *Migra*, the petitioner had already obtained a judgment in an Ohio court in an action for breach of contract and wrongful interference with her employment contract. She then filed her civil rights suit, under 42 U.S.C. section 1983, in federal district court, claiming a wrongful decision not to renew her contract. She sought both injunctive relief and compensatory and punitive damages. The defendants were granted a summary judgment on the basis of *res judicata*, and the Sixth Circuit affirmed.[56]

6.6 (b) Collateral Estoppel as a Defense

A form of *res judicata*, collateral estoppel, as a defense, has a narrow focus, and goes not to the claim but to the issues raised in a specific lawsuit. Where an issue was, in fact, raised in the initial action, and a decision was made by the court on that specific issue, that issue cannot be relitigated. In this situation collateral estoppel serves as a bar. Generally, if it is not certain that an issue was actually raised and decided in one action, collateral estoppel will not preclude the issue being raised in a subsequent action.[57] It appears that this defense (rather than *res judicata*) may be invoked more readily in school-related matters where section 1983 serves as the source of remedy.

6.6 (c) Statutes of Limitations

School boards in their policy-making activities and school administrators in their daily practice know the meaning and importance of meeting deadlines. For example, knowing that the state's code specifies that a tenured (or continuing contract) teacher must be given written notice of nonrenewal of employment on or before April 15 of each year or the contract will continue in effect for the ensuing year, prompts boards and administrators to make their official employment renewal decisions weeks before the code's specific date.

Similarly, dates and times are very important in the practice of law, especially in taking cases into court. An underlying principle of civil procedure demands that an individual who claims to have been wronged by another individual must assert his claim in a timely manner. An untimely delay will operate as a bar against the tardy claimant.

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[56] *Migra*, 465 U.S. 75-6.

[57] *See, e.g.*, McDonald v. West Branch, 466 U.S. 284 (1984). It is interesting to note that Justice Brennan points out, for the Court, that "when the rights guaranteed by section 1983 conflict with provisions of the collective-bargaining agreement, the arbitrator must enforce the agreement." *Id.* at 291.

Generally, each state in its procedural rules prescribes a time limit within which a certain type of suit (representing a cause of action) must be taken. As a general rule no cause of action will be maintained unless brought within that specified period. One must look to the code of a particular state to discover the appropriate statute of limitations for a certain type of cause of action in that state. In a section 1983 action, the court will look to the state in which the action is taken for the controlling statute of limitations.

Two decisions from the Burger Court's 1985 term (one involving schools) offer examples of the applicability of a statute of limitations defense in litigation involving section 1983. In *Wilson v. Garcia*[58] (a state police officer case), the Supreme Court made it clear that section 1983 claims are best characterized as "personal injury actions." Thus, since the matter originated in New Mexico, that state's three-year statute of limitations on personal injury cases was applicable in the federal court's adjudication of the matter.

Using the *Wilson* case, the Burger Court subsequently vacated the judgment of the Third Circuit and remanded a school case for further consideration regarding the applicability of the statute of limitations. In *Springfield Township School District v. Knoll*[59] (a sex discrimination case involving the failure to promote a female to an administrative position), the Burger Court held that the applicable statute of limitations in a section 1983 claim should be that which is appropriate in that state to recover damages for personal injuries.

6.6 (d) Eleventh Amendment Immunity

Generally, public school systems (usually called school districts or school divisions) are characterized as political subdivisions of the state carrying out the state's business, public education. As such, when a local school board official acts, it does so with the authority of the state.[60] The eleventh amendment states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign State.[61]

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[58] 471 U.S. 261 (1985). Justice Stevens delivered the Court's opinion, and Justice O'Connor dissented.

[59] 471 U.S. 288 (1985). Very recently, the Rehnquist Court held that where a state has multiple statutes of limitations for personal injury actions, the general personal injury statute applies and not the one for intentional torts. Owens v. Okure, 57 L.W. 4065 (January 10, 1989).

[60] E.E. Reutter, Jr., THE LAW OF PUBLIC EDUCATION at 139 (3rd ed. 1985).

[61] U.S. Const. amend. XI.

Historically, this provision has been interpreted also to include suits taken by a citizen of a state against his/her own state. In the recent past, attorneys have employed the amendment to preclude a state being sued without its consent.[62]

Where eleventh amendment immunity is claimed by school officials sued under section 1983, the immunity will be applied only where the court is convinced that the state itself is, through an overwhelming presence of state action, a party in the lawsuit. Thus, when a public school system is not considered by the laws of that state to be a "state entity" but rather a local one, that school district is not entitled to immunity under the eleventh amendment.[63]

During the 1984-85 term, in a decision involving a state hospital and having direct implications for public school systems, the Burger Court majority expressed the view that a state can waive its immunity from federal court jurisdiction.[64] However, said Justice Powell for the Court, the mere waiver by a state of its own sovereign immunity status does not in and of itself amount to a waiver of the protections of the eleventh amendment. To the majority, the state must specify an intent, unequivocally, to waive the amendment's immunity. Additionally, said the majority, "[t]he mere receipt of federal funds cannot establish that a state has consented to suit in federal court."[65]

According to precedent, the eleventh amendment does not automatically preclude a prevailing party from seeking and receiving attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976. The Burger Court's decision in *Hutto v. Finney* (1978) makes this point regarding civil rights actions taken against a state.[66]

6.6 (e) Good Faith as a Defense

As a general rule, local public school boards and their administrative officials have considerable autonomy in making policy and in formulating rules and procedures to implement their policies. Ordinarily, the official acts of board members and administrators are presumed lawful, regular, and necessary for the good of the school system.[67] Thus, when challenged in a lawsuit, courts initially presume that these officials have acted in good faith and the burden is on the complaining party to prove otherwise.

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[62] Vacca and Hudgins, *supra* note 4, at 34. However, as Swann tells us in a recent article, "The eleventh amendment, which once provided states with a secure defense against federal court litigation, now only provides states with a qualified defense." Swann, *The Eleventh Amendment Revisited: Suits Against State Governmental Entitles and Their Employees in Federal Cour.*, 14 J.Coll. & U.L. 1.2 (1987). *See also, Federal Tort Claims Act*, 28 U.S.C. 1346 *et seq.*

[63] The Burger Court spoke directly to this point in Mt. Healthy v. Doyle, 429 U.S. 274, 280 (1977) where it held, in that case, that the local school board was more like a county or city than an arm of the state; thus it was not entitled to assert eleventh amendment immunity from suit.

[64] *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). This case involved a section 504, Rehabilitation Act of 1973, employment matter.

[65] *Id.* at 235. Justices Brennan, Marshall, Blackmun and Stevens were in dissent. *See also* 65 A.L.R. Fed. 490, 494, where it said, "the judiciary has led a somewhat meandering search for balance between section 1983 and the Eleventh Amendment. The process has proved difficult, largely because courts have attempted to strike the balance on the definition of 'persons' who may be liable under 1983 rather than on standard Eleventh Amendment analysis."

[66] 437 U.S. 678 (1978). For the Civil Rights Attorney's Fees Award Act of 1976, *see* 42 U.S.C. 1988.

The affirmative defense of good faith, at least qualified good faith, is relied on by school officials sued under section 1983. Under the rules set down by the Burger Court, good faith will function as an acceptable defense where someone's constitutional or statutorily protected civil rights have been violated by an official action of the board, a board member, or a school administrator. However, official acts of school boards or administrators that violate the civil rights of employees, students, or parents are not within the bounds of good faith. And, as alluded to previously in this book, school officials cannot rely on ignorance as a defense for violating someone's civil rights, where their actions are in an area of settled law.

6.7 Remedies Available under Section 1983

In a civil suit, as a matter of tradition, remedies take two basic forms: legal relief (money damages) and equitable relief (e.g., injunctions, or back pay plus benefits). In contemporary courts this difference usually does not exist.

Today, people who have been wronged by someone else go into court seeking redress for that wrong. Basically, three broad categories of remedy are available to the court: declarative relief (the court defines the rights of the parties); specific relief (the court orders individuals to do or to stop doing something); and compensatory relief (the court orders payment in the form of money damages—nominal, compensatory, punitive).

As previous subsections demonstrate, in recent years the number and bases of civil rights tort cases have expanded. One result of this growing volume of case law has been the varied requests for remedy sought by plaintiffs. When the Act was first applied, no monetary damages were sought. Since then, however, plaintiffs have sought and been awarded greater damage claims against school boards, board members, and administrative officials.[68]

One major purpose of the award of damages under section 1983 is to compensate those who have been injured through a violation of their civil rights by state government or its agents. Generally, monetary damages sought under section 1983 are limited to awards of compensatory damages.

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[67] Vacca and Hudgins, *supra* note 4, at 265.
[68] *Id.* at 278.

Punitive damages are a possible source of remedy, even though not mentioned in section 1983, only where the intent of school officials is established as willful, wanton, malicious, or grossly reckless. Three decisions (one involving public schools) from the Burger years had definite implications for damages assessed a school board as a corporate entity.

Carey v. Piphus[69] (the Chicago public school decision) dealt with, among other things, an issue of possible recovery of damages by public school students against school board members, as individuals. Plaintiffs did not seek damages against the board in its corporate capacity. More specifically, the *Carey* case treated two section 1983 damage-related questions: the conditions that warrant the award of damages to students; and the amount of damages that can be assessed against local school officials in the event a student's civil rights have been violated. The students claimed a violation of their procedural due process in a suspension situation.[70]

A federal district court held in the students' favor and ruled that school officials were not entitled to good faith immunity, because they should have known that a suspension of that length without a hearing would violate due process. The trial court refused, however, to award damages because there was no evidence in the record to quantify student damages. This decision was reversed by the Seventh Circuit Court which held that the students were entitled to recover substantial nonpunitive damages even if their suspensions were justified, and even if they could not demonstrate any actual injury caused by the suspensions.[71]

In 1978, the Burger Court disagreed and ruled, by a vote of 8-0, that the students were entitled only to nominal damages in the absence of proof of actual injury. As Justice Powell observed, any kind of deprivation of procedural due process may cause some injury, but compensation should be tailored to the interests protected by the particular right in question.[72] The Court then placed limitations on recovery of damages under section 1983 when it said that, if the action of school officials was justified, the students should be entitled to nominal damages of one dollar by the "mere denial" of their rights. To recover substantial damages, appropriate to compensate for injuries suffered, a showing of actual injury is necessary. And, to recover punitive damages under section 1983, a malicious intention to cause injury on the part of school officials must be present.[73] In *Carey*, the Burger Court seemed to be putting fences around the expanding funnel of legal relief available under section 1983. This pattern would continue in subsequent decisions.

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[69] 435 U.S. 247 (1978). Justice Blackmun took no part in this decision.

[70] *Id.* The suit named as defendants, individually and in their official capacities, the principal, the General Superintendent of the City of Chicago Schools, and the members of the City of Chicago Board of Education. More recently, the Rehnquist Court held by a vote of 5-4 that school districts are not liable for the actions of individual officers unless the official acted as an ultimate policy maker. Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989).

[71] *Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976).

[72] *Carey*, 435 U.S. 247, 259.

Owen v. City of Independence[74] also treated the issue of damages, but it did not involve a public school system. For what he claimed was a "wrongful dismissal from his job," a police chief brought charges against various city officials as well as the city as a corporate body. Although Owen sought damages from both the city and various officials, the Burger Court held that the officials were entitled to good faith immunity and thus were not liable. No such immunity attached to the city.[75]

In reaching its decision regarding whether or not the police chief was entitled to damages, the Supreme Court applied the following standard: a local government may be liable only if the constitutional violation is caused by public officers or employees in the official execution of official governmental policy or custom made by the governmental body or by someone whose acts may be said to represent official policy.[76] More specifically, and applied to *Owen*, the Burger Court held that a city may be required to pay damages for depriving a public employee of liberty without due process of law if the employee is discharged without a public statement of reasons by the officer who has the sole authority to discharge that individual.[77] Also, the city may be required to pay damages if a city officer, without responsibility to discharge employees, makes independent statements at the time of termination of the employee that injures his reputation.[78]

Five years later, in another nonschool case having impact on officials in public education, the Burger Court added some parameters to section 1983 actions when it clearly distinguished between suits brought against government officials in their "official capacities," and those brought against them in their "individual capacities." Citing *Owen*, the Court held that a judgment against a public official in his official capacity imposes liability on the entity that he represents.[79] This statement could have serious ramifications for local school boards in their decision-making relationships with both their school superintendent and their school principals, especially in such sensitive areas as employee dismissal and student discipline.

Another major Burger Court decision on point was decided in 1981, and involved Newport, Rhode Island. The case arose over a concert scheduled for the city by a popular rock group called Blood, Sweat, and Tears. The mayor cancelled the performance on the basis of possible disturbances in the city. Fact Concerts, the promoter of the concert, successfully enjoined the mayor and city council, and the concert was held without incident. However, since only half the tickets were sold, Fact Concerts sued the city, the mayor, and six council members for both compensatory and punitive damages. Fact Concerts prevailed at both trial and on appeal. The matter then went to the Supreme Court. The specific issue in *City of Newport v. Fact Concerts, Inc.*[80] was whether section 1983 was intended to allow punitive damages against a municipality, since the Court had already determined that compensatory damages could be awarded against a corporate body.

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[73] *Id.* at 266.

[74] 445 U.S. 622 (1980). The Court's ruling was 5-4 with Justice Powell filing a dissenting opinion, in which Justices Stewart, Rehnquist and Chief Justice Burger joined.

[75] *Id.* at 638.

[76] *Id.* at 652.

[77] *Id.* at 653.

[78] *Id.* at 656-57.

[79] Brandon v. Holt, 473 U.S. 464 (1985). Justice Stevens delivered the Court's opinion.

The Court divided 6-3 and held that punitive damages could not be assessed. In Justice Blackmun's opinion, neither the history of the Act nor public policy permit "exposing a municipality to punitive damages for the bad faith actions of its officials."[81]

Not meant as a source of substantive rights, section 1983 is a source of remedy and, as this chapter demonstrates, in the event that school officials are held liable under section 1983, the possibilities for remedy are broad. The case law shows that types of remedy available to prevailing parties may be injunctive relief, reinstatement to school (for students) and to job (for employees), back pay, lost benefits, expungement of record, and removal of letters of reprimand from files.

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[80] 453 U.S. 247 (1981). In this decision, Justice Brennan filed a dissenting opinion joined by Justices Marshall and Stevens.

[81] *Id.* at 267. Here, Justice Blackmun said: "We conclude that the deterrence rationale of 1983 does not justify making punitive damages available against municipalities."

CHAPTER SEVEN

THE LEGACY OF THE BURGER COURT AND THE SCHOOLS

7.0 Overview

The chapters of this book are devoted to a careful examination of several of the leading education decisions over the seventeen years of the Burger Court, in search of that Court's judicial legacy. No attempt has been made to include all of the opinions; rather, selected ones have been presented and analyzed because of their subject matter and their potential impact on the day-to-day operation of public school systems.

7.1 The Court's Personality

As stated in the Preface, several influential holdovers of the Warren years remained on the Court during the first years under Warren E. Burger's tenure. Thus, it was not possible for the new Chief Justice to place an immediate and firm grip on the judicial reins. Justices Black, Harlan, Douglas, and Stewart continued to function as key players during the early Burger years.

Gradually, as the Warren Court holdovers were replaced by Justices Blackmun (1970), Powell (1972), Rehnquist (1972), Stevens (1975), and O'Connor (1981), the Burger Court began to develop its own personality and accompanying judicial philosophy. The pivotal personnel changes came in 1971, when both Justices Black and Harlan left the bench, again in 1975 when Justice Douglas formally resigned, and in 1981 when Justice Stewart retired. As the Court's education decisions illustrate, between 1972 and 1975 the true and more conservative identity of the Burger Court began to emerge.

As revealed by an analysis of the Burger court's voting pattern on the education-related cases presented in this book, definite coalitions among the justices became obvious. More times than not, over its seventeen-year history, Chief Justice Burger and Justice Rehnquist seemed to be in agreement, and they frequently were joined by the two centrist members, Justices Powell and White. The addition of Justice O'Connor in 1981 added a fifth member to what can be characterized as the more conservative side of the Court. On the other hand, on the more liberal side of the Court were Justices Brennan and Marshall who, on several issues, were joined by Justices Blackmun and Stevens (often in dissent).

Over its several terms the more consistent voting pattern on major education issues resulted in 5-4 or 6-3 tallies. And, within these overall votes could be found several plurality opinions from which little judicial guidance could be gleaned.

7.2 The Burger Court Standards

Between 1969 and 1986, the Burger Court maintained a busy education docket. As the preceding chapters illustrate, several of the Court's more than 100 pronouncements on education will continue to have a profound impact on the practice of school administration in both the public and private sectors.

Certainly not oriented to accomplishing social change, the United States Supreme Court under Warren E. Burger generally maintained a middle-of-the-road posture. Yet, in some areas (e.g., desegregation, student rights, and employment) the Court carried forward and even expanded constitutional principles enunciated during the Warren Court era. On balance, however, the opinions contained in the previous chapters reveal the emergence of a more conservative Court, and one that worked to return more authority to public school boards and administrators to run the schools.

Unlike the Warren Court, the Burger Court will not be remembered for making sweeping constitutional pronouncements. Rather, it is the standards (tools of judicial analysis) developed in such cases as *Lemon, Roth, Sindermann, LaFleur, Goss, Wood, Ingraham, Swann, T.L.O., and Fraser* that form the heart of the Burger legacy. As already demonstrated in the first terms of the Supreme Court under William Rehnquist, the Burger Court standards have limited the scope of analysis and the choices of remedy available to that Court. With the addition of Justices Scalia and Kennedy the chances of the Burger legacy firmly vesting during the Rehnquist years is almost certain. To put it another way, over its seventeen-year history the Supreme Court under Warren E. Burger generally took a right-of-center path on education issues, a direction maintained during the first terms of the new Chief Justice.

7.3 Employment

In matters of employment the Burger Court generally followed a moderate path. Yet, in some respects the Burger Court expanded its judicial review of employment discrimination beyond the narrow issues of alleged racial discrimination carried over from the Warren years, to matters of gender discrimination and national origin discrimination. Throughout its several opinions on employment the High Court under Warren Burger consistently stressed the importance of judging current patterns and practices of hiring, transfer, and dismissal against the historical record of the specific place. Each case had to be judged on the merits.

The Supreme Court under Warren Burger should also be credited with stressing the importance of employers relying on substantive documentation to undergird each employment decision, where pretext is alleged. Beginning with the landmark nonschool case *Griggs v. Duke Power*, the High Court, in each of its subsequent decisions, stressed the importance of using hard data to justify each employment decision as being legally sound.

On some employment issues, however, the several opinions reviewed in this book show the Burger Court taking a more cautious approach. One such area involves matters of affirmative action. This is not to say that the Court assumed a negative position on this remedial measure; it did not. Once again the Court stressed using the historical antecedents (i.e., the past pattern and practice) of each situation as the context within which to evaluate the merits of a specific plan. Further, as the majority opinion stressed in *Wygant*, past inequities are better remedied by the least intrusive means, such as hiring goals.

On first amendment matters of speech and expression the Burger Court was more conservative, as it worked to strike a practical balance between the freedoms of employees in the workplace, and the prerogatives of employers to maintain order. Where employees comment or in some other way express their feelings on matters of private concern, the balance tips in favor of the employer (the school board and its administration). On matters of public concern the employee's right to speak receives constitutional protection, absent disruption of the workplace.

7.4 Students

The Burger Court handed down a number of decisions affecting students in a variety of ways. Some of these decisions involved fundamental constitutional rights while others were grounded in federal and state statutes.

In almost all of the decisions, the Court acted with restraint. It recognized that students have constitutional rights; at the same time it pointed out that these rights are not limitless. School officials have considerable autonomy in making decisions which tend to insure that campuses are orderly, students are disciplined reasonably, and instructors can teach without interruption. The result was a balancing test in which students' rights are at issue. On reflection, the Court tended to tilt in favor of school officials. It reserved their right to administer corporal punishment, to suspend students with minimal due process guarantees, and to search students without being subject to the same strictures of the fourth amendment as are other governmental agents.

The Burger Court decided little regarding students and the first amendment. At the beginning of its tenure it failed to overrule school board members who had removed library books because of disagreement over their content. At the end of its tenure it held that school officials could define acceptable student speech and discipline students for failure to abide by administrative standards. The Court decided very few cases dealing with student speech between these two cases.

A number of the Burger Court decisions about students involved, in some fashion, the legality of statutes and policies on assignment and attendance. For the first time the Court entertained the legality of gender as the criterion in assignment of students to schools. It avoided two rulings on the merits of the appeals and in a third, overturned a gender-based admissions policy. It ruled that undocumented alien children have the right to attend public schools, provided those children show evidence of intending to remain in the school district. It allowed Amish children to be exempt from public school attendance beyond the eighth grade.

The Court affirmed the right of handicapped children to attend public schools, but it ruled that their rights are not limitless. The institution need make only reasonable accommodations in facilities and programs for these students. Also, related services include those services necessary for a child to benefit from public education and which can be performed by educators, not specialists.

The Burger Court consistently ruled that in matters of religion, public schools cannot endorse activities that promote sectarian ends. It relied on the three-part test of *Lemon I* in rejecting state-led prayers under the guise of conducting a moment of silence and in voiding the display of the Ten Commandments in public schools.

In sheer variety of legal issues before it, the Burger Court far outstripped previous Supreme Court action. The Court could not be construed as being activist, for it did not expand materially the rights of students. During the Burger years the pendulum began to swing away from student rights and back to more control by school officials. However, on balance, the Court could not be construed as being pro-school officials for it acknowledged that students have rights. Its middle-of-the-road stance spoke to the rights of students under controlled conditions.

7.5 Race

As the Burger Court took form, the justices indicated at the outset that they were committed to following the unified, consistent rulings of the Warren Court on public school desegregation. The Court's early rulings followed that stance, a position that remained unaltered for three years.

That position changed, however, as the Court membership changed. Whereas the Warren Court ruled consistently in favor of plaintiffs alleging racial discrimination, the Burger Court was less bold. Approximately one-third into its tenure it spoke even less forcefully when it recognized that the judiciary can go only so far in ordering desegregation. The Burger Court noted that courts are powerless to exercise full control over what happens to a school system once it is desegregated. The resegregation that occurs may not be subject to court action when shifts of population are not tied to de jure action.

The Supreme Court under Warren Burger consistently took a firm position on segregation in private schools. In the few cases heard by the Court, the justices ruled in favor of the plaintiffs, thus speaking with disfavor on efforts of private schools to practice discrimination.

As the Burger Court began to assume its own identity in the mid-1970s, it became more passive as it allowed people time and opportunity to catch up with almost two decades of court-led desegregation. The justices also recognized that the legislative branch should assume leadership in seeing that unitary schools are established. Thus, in a half decade, the Burger court abandoned the Warren Court activism and moved to a more passive role.

The passive role of the Burger Court continued throughout the 1980s when Ronald Reagan served as President. The President did not assume any initiative in pushing for desegregation, consequently there was less legal action. Only three education desegregation opinions were handed down in the nearly six years of the Burger Court during the 1980s.

Like the Warren Court, the Burger Court held that pupil assignment to schools based on race is unconstitutional. Both Courts declined to state criteria for determining when a school system is desegregated because they probably could not do so. The Burger Court agreed with its predecessor in holding that the source of discrimination in laws or constitutional provisions is unacceptable, and it looked also at the very existence of segregation. Thus, it found that the sources of segregation as well as the end result of discrimination are significant legal considerations.

Within the last three decades, pupils and faculty have been assigned to desegregated schools. Programs of study have been developed to be responsive to children of various racial and ethnic backgrounds. Considerable progress has been made in converting dual school systems into unitary districts. Shifts of population have occurred, in the meantime, and resegregation has resulted, a condition that the Burger Court saw that it could not or should not rectify. The momentum of desegregation slowed down, but the problem remained, in part, unresolved.

7.6 Finance

On matters of school finance the Burger Court showed, through its landmark *Rodriguez* decision, a reluctance to interfere with ways in which specific states finance their public school systems. Yet, on matters of using public funds to support education in church-related settings the Court was quick to become involved, consistently utilizing the *Lemon* standard's tough three-pronged approach to call a halt to such endeavors. In this specific area of finance litigation, however, while the Burger Court as a whole assumed a more activist role as it worked to protect the first amendment's establishment clause, the justices often demonstrated a lack of agreement on the issues present. A good example of this splintering effect can be found in *Wolman v. Walter*, in which a total of 16 different dissents were filed on the issues.

During the early 1970s tuition and tax issues were added to the Burger Court's docket, and a change in attitude began to emerge. In *Committee for Public Education & Religious Liberty v. Nyquist* (1973), the Court showed an extreme sensitivity to possible church-state entanglement when it declared unconstitutional both a cash reimbursement to low income parents for costs incurred in sending their children to private schools, and a tax break for other parents who did not qualify for tuition reimbursement. Yet, a decade later, in *Mueller v. Allen* the Court held constitutional Minnesota's law permitting all parents (public and private school) to deduct certain school costs and expenses from their state income tax returns.

During Chief Justice Burger's tenure, other tax-related questions came before the High Court, especially involving questions of discrimination in colleges and universities. In the *Bob Jones* case and in *Grove City* the majority opinions can be characterized as more public policy-oriented, as the Court struggled to retain its strong anti-discrimination path begun in the early student and employee discrimination cases. *Witters*, on the other hand, in what is characterized as a spirit of accommodation, represents an exception, as the Court allowed direct financial assistance, from public funds, to a disabled student in a private Christian college.

Thus, between 1971 and 1986, the Supreme Court under Warren Burger was not a change-oriented tribunal on matters of school finance. On balance the Court is more accurately characterized as moderate to conservative.

7.7 Civil Rights Torts

As pointed out in Chapter 6, 42 U.S.C. section 1983 remained a judicial abstraction in the terms immediately preceding the Burger years. In Warren Court decisions such as *Monroe v. Pape*, however, a new era was begun.

And, when the Burger Court ruled that public school students had standing to sue school officials in the *Wood* case for violations of constitutional or statutory rights, the concept of a civil rights tort claim became a regular feature in public school law as a broad spectrum of plaintiffs sought remedy against school boards and administrators. Further, if an official knew or should have known that the action taken violated someone's rights he would be subject to liability.

As the case law reviewed in this book demonstrates, the Burger legacy is most profound in two specific areas of section 1983 law: damage claims against school officials, and attorneys' fees requested by prevailing parties. In both areas, however, employees, not students, have been more successful in utilizing the broad scope of remedies available under this civil rights provision.

Over its several terms, on the issue of damages, the Burger majority took a cautious approach. While opening the way to possible compensatory damages, the Court showed a reluctance to allow awards of punitive damages against school officials, absent a showing of a malicious intent to harm. Similarly, the Court, as a general rule, insisted that aggrieved parties seek remedy through existing administrative channels, unless this step would prove futile. In areas of school law such as special education, the Burger Court was also reluctant to allow remedy beyond the confines of the Education for All Handicapped Children Act, and it would only entertain requests for additional remedy in the form of damages under section 504 of the Rehabilitation Act of 1973. Qualified immunity, and not absolute immunity, became the major defense for school officials named in the emerging civil rights tort claims.

On issues of attorneys' fees the Burger Court took a more activist approach, opening the way to awards of such fees to prevailing parties. During the Burger years, the view initially articulated in *Monell* (1978), that prevailing parties could request reasonable attorneys' fees in civil rights tort actions as a way of transferring the costs of litigation to those who infringe on someone else's basic rights, became the rule in section 1983 cases. But, as with the issue of damages, the Burger Court showed a reluctance to allow attorneys' fees under the Education for All Handicapped Children Act, while it was open to such claims under section 504 of the Rehabilitation Act of 1973.

7.8 A Final Word

What shall historians note about the Burger Court? First, it will be remembered for its stability of membership. Over the seventeen year period there were only thirteen individuals who served on the Court, and that number included the Chief Justice. Of the thirteen, four people, including Burger, served the entire seventeen years. The other three were Justices Brennan, White, and Marshall. The stability becomes even more pronounced when one notes that there was only one change on the High Court during the last eleven years of Burger's tenure. The change occurred in 1981 when Justice O'Connor replaced Justice Stewart. The four earlier additions had occurred from 1970-75.

What, however, is the real legacy of the Burger Court? Before answering, one remembers the Marshall Court for a limited number of decisions, each of which helped shape the nation and clarify the role of the judicial branch of government. The Warren Court is remembered for its decisions which extended social justice to all citizens. The Burger Court, however, defies simplistic characterization. Whereas the Warren Court grappled with only three broad educational issues—desegregation, academic freedom, and religion—the Burger Court treated these same issues plus those involving finance, unions and torts. Whereas the Warren Court treated only one case involving students (excluding issues related to pupil assignment and participation in religious activities), the Burger Court was asked to resolve questions involving legality of corporal punishment, suspension, search and seizure, special education services, and rights of alien children.

Among the many decisions handed down by the Burger Court, none qualifies as a major landmark opinion which compares with *Brown*. *Rodriguez* cannot be characterized as being insignificant, but its significance lies in what the Court did not do rather than by what it did decide. *Roth* is important, not because of its assurance of minimal due process to employees, but because it refused to usurp the authority of state legislatures in determining the rights of nontenured teachers. Much of the significance of the Burger Court opinions lies in the justices' reluctance to expand the constitutional rights of individuals which were articulated during the Warren years.

The Burger Court had opportunities to reverse decisions of the Warren Court, but it did not do so. Instead, it tended to chip away slightly at previous decisions without rejecting them outright. In this respect the Court labeled itself as a middle-of-the-road tribunal, and its legacy reflects that stance.

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